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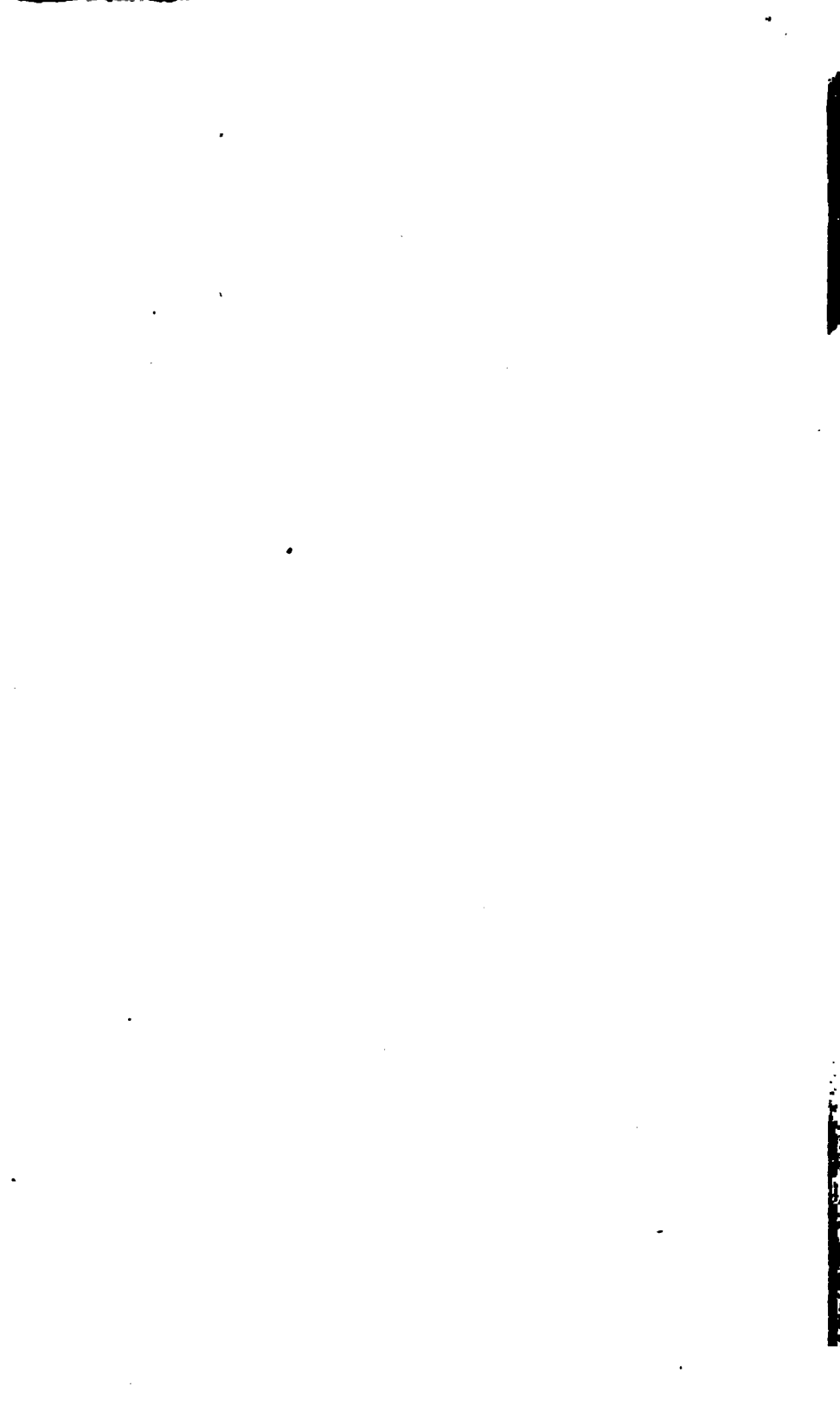
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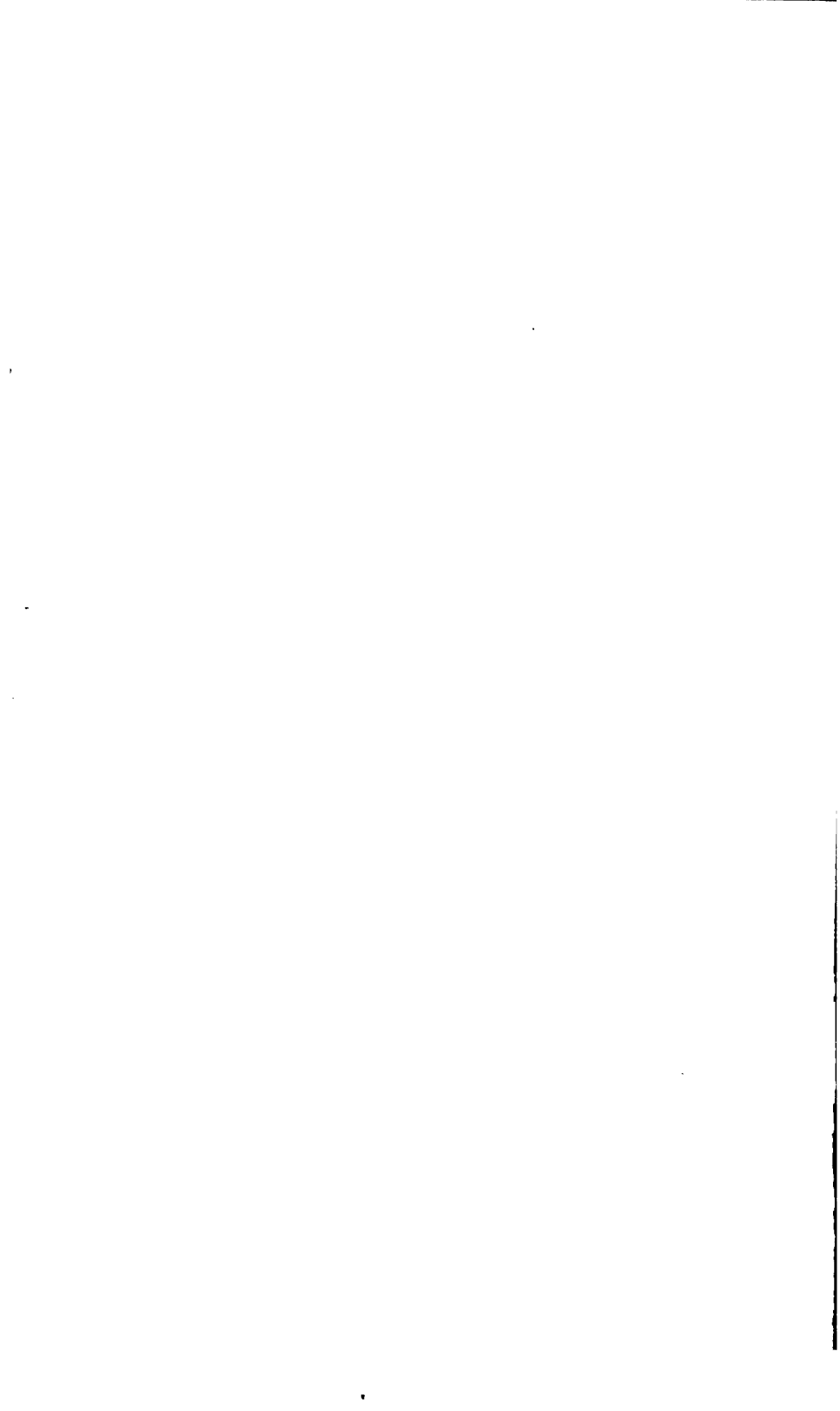
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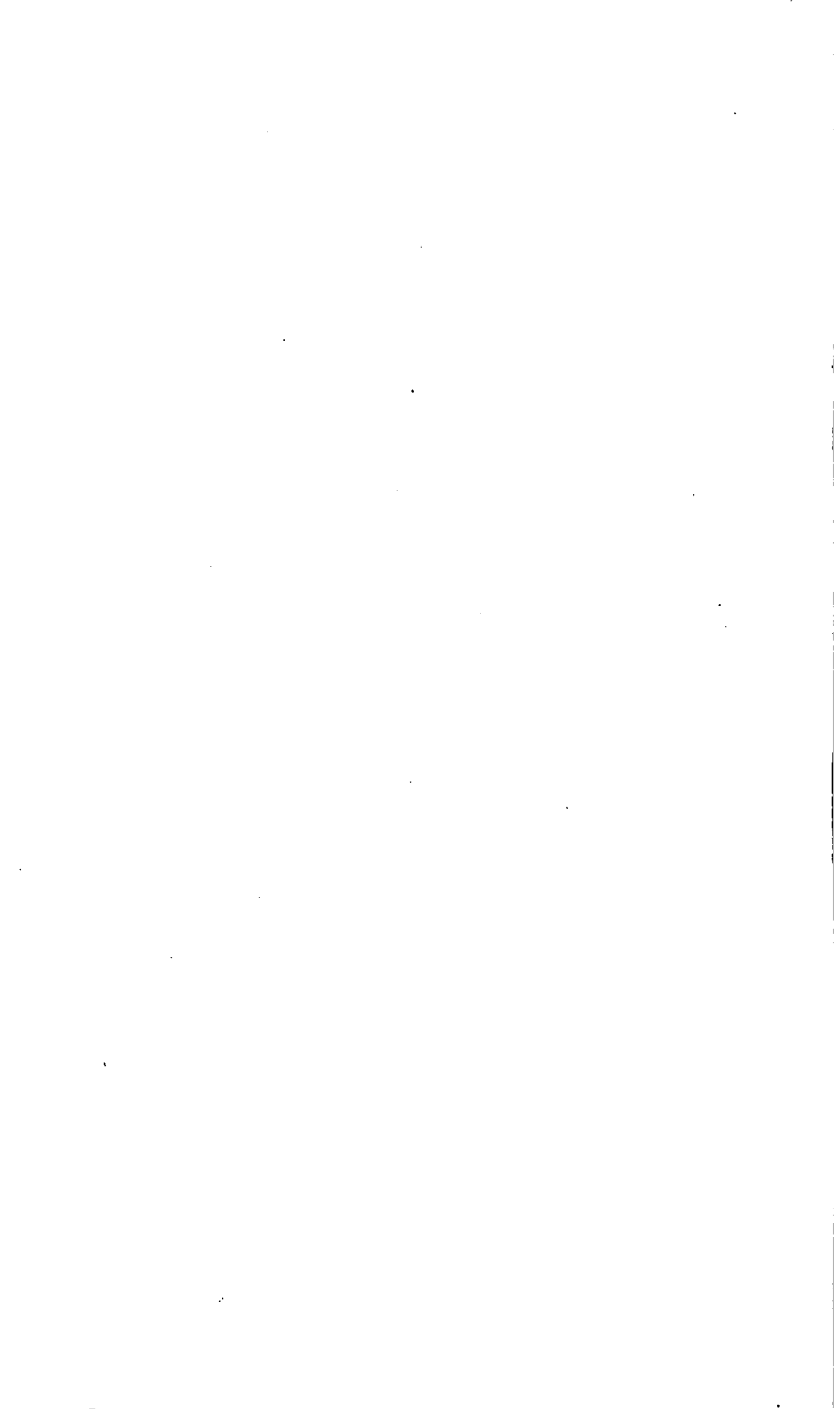
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THE 54
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

Geo B Young THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

COUNSELOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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VOL. LXVII.

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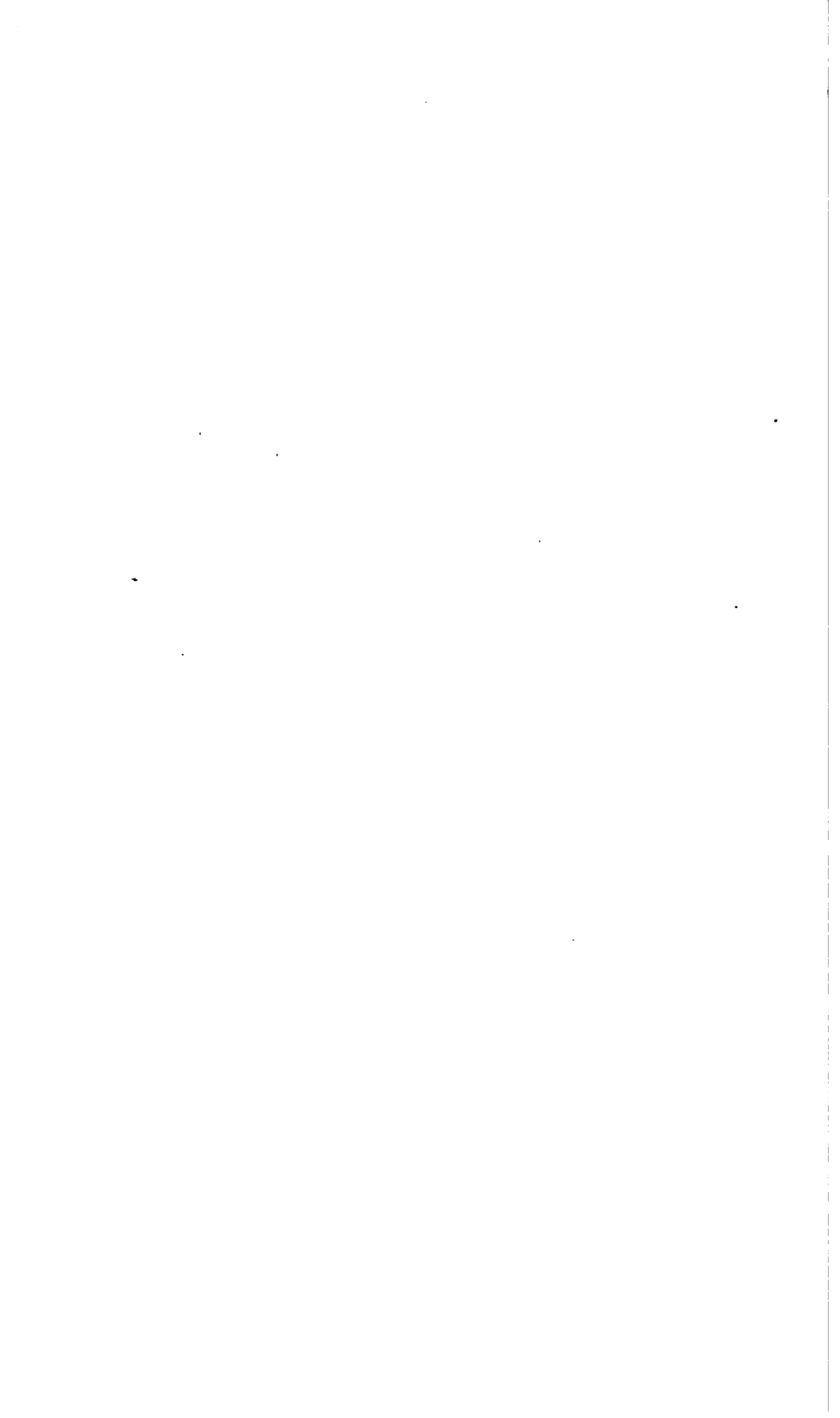
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AMERICAN DECISIONS.
VOL. LXVII.



CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

McGUIRE v. GRANT.

[1 DUTCHER, 356.]

THERE IS INCIDENT TO LAND, IN ITS NATURAL CONDITION, RIGHT TO SUPPORT FROM ADJOINING LAND; and if the land sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained.

MEASURE OF DAMAGES IN ACTION FOR CAUSING LAND TO SINK OR FALL AWAY in consequence of the removal of its support by adjoining land, is the diminution in the value of the land or lot, and not what it will cost to restore the lot to its former condition, or to build a wall to support it. This applies to land not subject to artificial pressure, as where no buildings stand thereon.

OWNER CANNOT RECOVER FOR INJURY DONE TO BUILDING STANDING ON BOUNDARY LINE OF LOT, which tumbles down by reason of excavations made upon adjoining lot, where there has been no improper motive or carelessness in the execution of the work. The loss is *damnum absque injuria*.

DEFENDANT IS PERSONALLY RESPONSIBLE FOR HIS INJURIOUS ACT IN REMOVING NATURAL SUPPORT OF LAND not subjected to artificial pressure, or not having buildings thereon, if such act were done by himself, or by his direction, or by persons in his employ.

TO RENDER DEFENDANT LIABLE WHERE ACT COMPLAINED OF WAS NOT DONE BY HIM, the relation of master and servant must exist between him and those by whose instrumentality the act was done, except in some cases where he renders himself a legal participator in wrongful acts by subsequently adopting and sanctioning them.

MASTER'S RESPONSIBILITY FOR TORTIOUS ACTS OF HIS SERVANT WHICH WERE DONE IN HIS SERVICE grows out of, is measured by, and begins and ends with his control over them.

OWNER, OR PRINCIPAL CONTRACTOR, OR MASTER WORKMAN, IS NOT RESPONSIBLE FOR DAMAGE OCCASIONED by the wrongful acts of persons employed by a subcontractor or under-workman, or by a person carrying on a dis-

tinct independent employment, because they are not his servants, and do not act for him, but for their immediate employer.

WHERE CHAIRMAN OF STREET COMMITTEE OF MUNICIPAL CORPORATION ORDERS LAWFUL ACT, such as the performance of certain work, to be done, and the work is done, so as to occasion an actionable injury, by workmen under the immediate superintendence and direction of the street commissioner, who is a distinct and independent officer of such corporation, not appointed or controlled by the committee, such chairman is not liable for injury resulting from the work.

DEFENDANT MAY DENY HIS LIABILITY UNDER GENERAL ISSUE, but he must plead justification specially.

THIS case was certified from the Mercer circuit for the advisory opinion of the supreme court. The action was brought for damages done to plaintiff's lot, caused by excavations made upon an adjoining one. The general issue was pleaded. The opinion of Elmer, J., sufficiently states the facts. Plaintiff was nonsuited. The opinion of the supreme court was wanted on the following points: 1. Upon the facts stated, can an action be maintained by the plaintiff for the injury done to his land? 2. Is the defendant liable for the injury? 3. If yea, can he avail himself of the legal defense offered under the general issue? 4. If the defendant be liable, what is the measure of damages?

Halsted, for the plaintiff.

Beasley, for the defendant.

By Court, GREEN, C. J. The first question submitted for consideration is whether, upon the facts stated in the case certified, an action can be maintained by the plaintiff for the injury done to his land. The injury complained of consists in the settling and falling away of the plaintiff's land in consequence of excavations made upon an adjoining lot. If the acts complained of were done with a malicious intent, or if the injury sustained by the plaintiff resulted from the careless and improper manner in which the work was executed, it is not denied that the plaintiff would be entitled to recover. The existence of improper motive, or of negligence or unskillfulness in the performance of the work, are questions of fact for a jury: *Walters v. Pfeil*, 1 Moo. & M. 362; *Dodd v. Holme*, 1 Ad. & El. 493; *Panton v. Holland*, 17 Johns. 92 [8 Am. Dec. 369].

The case presents the simple inquiry, whether, in the absence of improper motive or negligence on the part of the defendant, the owner of land is entitled to recover for injuries sustained by the settling or falling away of his land, occasioned by excava-

tions made on an adjoining lot. From the facts stated in the case, it must be assumed that the excavation was not made to an extraordinary or unusual depth; for although the excavation was made for the purpose of obtaining gravel, and was twenty feet below the surface of the plaintiff's lot, it was but two or three feet below the grade of Cooper street, upon which the lot in which the excavation was made fronted. It was not, therefore, a greater excavation than would be required for the ordinary purposes of building.

It is insisted, on the part of the defendant, that the maxim, *Sic utere tuo ut alienum non lædas*, applies, in its broadest signification, to the question under consideration; that while the owner of the land owns not only the surface of the soil, but above and below it to an indefinite extent, he is bound so to use and enjoy his own property as to occasion no injury to the property of others; and that, consequently, while excavating upon his own soil, he is answerable for every injury done to the buildings or land of an adjoining proprietor. The principle, it is certain, does not admit of so broad an application. There are many acts done in the exercise of individual rights which occasion loss to others, which nevertheless afford no subject of legal redress. The loss they occasion is, in the eye of the law, *damnum absque injuria*. The line which separates this class of acts from those which form the subjects of legal redress is often shadowy and indistinct. It rests frequently upon grounds of public policy, or upon the mere force of authority, rather than upon any clear or well-defined principle.

It is well settled that where the owner of a lot builds upon his boundary line, and the building is thrown down by reason of excavations made upon the adjoining lot (in the absence of improper motive and carelessness in the execution of the work), no recovery can be had for the injury done to the building. There are two early cases in which, under similar circumstances, a recovery was had, though it does not appear that in either of them the point now under consideration was distinctly raised. In one of them the exceptions taken were confined to the form of the declaration: *Slingsley v. Barnard*, Rolle, 430; *Smith v. Martin*, 2 Saund. 394.

But the cases denying the right of recovery under such circumstances are so numerous, and the modern cases so uniform, that the question must be considered as finally at rest, so far as authority can settle it: 2 Roll. Abr. 565, tit. Trespass, I, pl. 1; Com. Dig., tit. Action on the Case for Nuisance, C; *Massey v.*

Goyder, 4 Car. & P. 161; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mee. & W. 220; *Humphries v. Brogden*, 12 Ad. & El., N. S., 739; *Gayford v. Nicholls*, 9 Exch. 702; *Thurston v. Hancock*, 12 Mass. 220 [7 Am. Dec. 57]; *Panton v. Holland*, 17 Johns. 92 [8 Am. Dec. 369]; *Lasala v. Holbrook*, 4 Paige, 169 [25 Am. Dec. 524]; *Hay v. Cohoes Co.*, 2 N. Y. 159 [51 Am. Dec. 279]. The principle upon which the decisions rest has been so elaborately discussed, and so repeatedly and thoroughly investigated, that a reinvestigation would be profitless labor. It is only necessary to say that we regard the question as settled in accordance with principle and sound policy.

Whether the same principle applies to injuries done to the soil in its natural condition, with no buildings erected upon it, is a question of more difficult solution, and which, until recently, has not been the subject of express adjudication. It has, however, frequently been discussed, and the principle upon which it rests investigated. The distinction between a claim for an injury to the soil, and to buildings erected upon it, appears to have been first noted by Sergeant Rolle, in his note to the case of *Wilde v. Minsterly*: 2 Roll. Abr. 564, tit. Trespass. The report is as follows: "If A, seised in fee of copyhold land closely adjoining the land of B, and A erect a new house upon his land, and any part of his house is erected on the confines of his land adjoining the land of B, if B afterwards dig his land so near to the foundation of the house of A, but not in the land of A, that by it the foundation of the messuage and the messuage itself fall into the pit, still no action lies by A against B, inasmuch as it was the fault of A himself, that he built his house so near the land of B; for he cannot by his own act prevent B from making the best use of his land that he can." "But it seems," the reporter adds, "that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit, and an action brought for such an act would lie." This *dictum* is cited as authority by Baron Comyns, Com. Dig., tit. Action on the Case for Nuisance, A.

It certainly seems paradoxical, at first view, that a man may recover for an injury done to his land by an excavation in the land of his neighbor, but not for an injury by the same act to the buildings erected upon the land. But it will appear, upon consideration, that the distinction is founded in reason and sound principle. The distinction and the grounds of it are thus stated by Gale & Whately, Law of Easements, 215, 218: "The right to support from the adjoining soil, may be claimed either in respect

of the land in its natural state, or land subjected to an artificial pressure by means of buildings or otherwise. If every proprietor of land was at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the land of his neighbor, it is obvious that the withdrawal of the lateral support would in many cases cause the falling in of the land adjoining. As far as the mere support to the soil is concerned, such support must have been afforded as long as the land itself has been in existence. And it would seem, in all those cases at least in which the owner of the land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, that he has acquired, by such ancient enjoyment, a right to the support of it, rather as a right of property than as an easement, as being necessarily and naturally attached to the soil. The negation of this principle would be incompatible with the very security for property, as it is obvious that if the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone. . . . Where, however, anything has been done to increase the lateral pressure, as where buildings have been erected, it appears to be clearly settled that no man has a right to such increased support, unless the building or other thing which makes it necessary is of ancient erection."

In *Wyatt v. Harrison*, 3 Barn. & Adol. 871, Lord Tenterden, in delivering the judgment of the court of king's bench, said: "It may be true that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it; and this is consistent with 2 Roll. Abr., tit. Trespass, I, pl. 1."

"This right to lateral support from adjoining soil," said Lord Campbell, in delivering the judgment of the court of queen's bench, "is not like the support of one building upon another, supposed to be gained by grant, but it is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close, the very instant when the conveyance is executed, as much as

after the expiration of twenty years or any longer period:" *Humphries v. Brodgen*, 12 Ad. & El., N. S., 743.

In *Thurston v. Hancock*, 12 Mass. 220 [7 Am. Dec. 57], Chief Justice Parker, in delivering the judgment in the supreme court of Massachusetts, said: "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line of his neighbor."

In *Hay v. Cohoes Co.*, 2 N. Y. 162 [51 Am. Dec. 279], Gardiner, J., in delivering the judgment of the court of appeals of the state of New York, after citing the *dictum* of Rolle, that "a man cannot dig his land so near mine as to cause mine to slide into the pit," said: "In the last case the injury would consist in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit-owner would, I apprehend, justify the transfer of a portion of another man's land to his own."

In *Lasala v. Holbrook*, 4 Paige, 172 [25 Am. Dec. 524], Chancellor Walworth says: "I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, and the owners of these lots will not be permitted to destroy my land by removing this natural support or barrier. Thus, it is laid down by Rolle that 'I may sustain an action against a man who digs a pit on his own land so near to my lot that my land falls into the pit. But my neighbor has the right to dig the pit upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to my land, in its natural state. I cannot, therefore, deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit, which he may dig in the proper and legitimate exercise of his previous right to improve his lot.'"

In neither of the foregoing cases, in which the *dictum* of Rolle was cited and approved, was the question now under consideration the precise point adjudicated.

But in *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465 [60 Am. Dec. 283], the plaintiff claimed damages upon the ground, among others, that the defendants had made an excavation for their railroad so near to the line of the plaintiff's land that a part of his soil had fallen away. The court adopted the

distinction taken by Rolle, and held that the plaintiff was entitled to recover. They say the injury is in depriving the owner of a portion of his soil, to which his right is absolute.

In *Farrand v. Marshall*, 19 Barb. 380, an injunction had been granted in equity, to restrain the defendant from removing the earth adjacent to the plaintiff's land, for the purpose of making brick, and thus withdrawing the natural support of the plaintiff's soil, and permitting it to sink down and slide away. A motion to dissolve the injunction was denied by Harris, J. In delivering the opinion he said: "The right to lateral support must be regarded as an incident to the land. It is a right of property necessarily and naturally attached to the soil." In this case, it appeared that the plaintiff's land was a city lot upon high ground, and that the defendant was making his excavation to the depth of fifty feet, for purposes to which such lands are not usually applied.

The only judicial opinion which I have met with in conflict with this weight of authority will be found in *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N. Y. 202 [53 Am. Dec. 357]. Mr. Justice Bronson, in delivering the opinion of the court of appeals of New York in that case, assailed the doctrine with his accustomed vigor and force of argument, and denied that it was law. It seems, however, from a statement in *Farrand v. Marshall*, 19 Barb. 384, that this part of the opinion was not the opinion of the court, and it certainly was not the point at issue in the cause, nor necessarily involved in the decision.

In a note of the accurate and critical American editors to *Brown v. Windsor*, 1 Cramp. & J. 29, it is said: "This cautious suggestion [of Rolle, 2 Roll. Abr. 564] is magnified by Lord Campbell, C. J., in *Humphries v. Brogden*, 12 Ad. & El., N. S., 739, into an authority for the principle that though there is not a right of lateral support for buildings, there is a right of lateral support to soil from the adjoining soil, which is a right of property passing with the soil. In that laborious opinion, Lord Campbell appears quite to misunderstand the meaning of Rolle, and to import into the English law a doctrine which has no rightful existence there. The true principle to be gathered from the passage in Rolle is, that the owner of soil owes no support to either the soil or the buildings of his neighbor; but that in excavating his own soil he has no right to rob his neighbor of soil that belongs to him; and therefore, if he brings down his neighbor's soil into the cavity which he has made in his own, he is responsible to him for the value of the soil which he has.

thus abstracted." There may be consequences resulting from the doctrine that the right to lateral support from the adjoining land is a right of property, which will require it to be adopted with some qualifications. But in the absence of any such right, it is difficult to perceive how the party removing the adjacent soil can possibly be regarded as a wrong-doer, or be held liable in damages for the consequences of the act. If the soil removed belongs to the defendant, and the plaintiff has no right to require that it should remain undisturbed, as far as may be necessary to support his soil, upon what principle is it that the defendant can be held accountable for the fall of the plaintiff's soil?

The decided weight of authority and sound principle concur in support of the position that there is incident to land in its natural condition a right to support from the adjoining land; and that if the land sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained.

The measure of damages in such case is not what it will cost to restore the lot to its former situation, or to build a wall to support it, but what is the lot diminished in value, by reason of the acts of the defendant. It will frequently happen that the subsidence of land in a city, occasioned by the grading of adjoining lots, thus bringing the surface nearer to the grade of the street, will but slightly diminish its real value. The only true criterion of damages, therefore, is the diminution in the value of the lot. How far the injury resulted from the acts of the defendant, and how far it was occasioned by others, is a question of fact for a jury.

In examining the plaintiff's right to damages for the injury done to his land, we have assumed that the wrongful acts were done by the defendant, or by his direction. It remains to inquire whether the defendant is legally responsible for the acts which occasioned the injury. It is a conceded principle that if the injurious acts were done by the defendant, or by his direction, or by persons in his employ, he is personally responsible.

The acts were not done by the defendant himself, nor by persons acting under his immediate direction or for his personal benefit. The work was done for the city of Trenton. It was done under the immediate direction and superintendence of the street commissioner, an officer appointed by the common council. It was done by laborers employed, directed, and controlled, so far as appears, exclusively by the street commissioner, and

who were neither employed, paid, nor controlled by the defendant. The defendant was chairman of the street committee, under whose direction the work upon the streets was done, and whose business it was to procure gravel for the streets. In performance of this duty, the defendant purchased gravel of McCall, for the use of the city, and directed the commissioner to go upon McCall's lot to procure it whenever wanted for the use of the city. This general direction was given several months before the injury was sustained by the plaintiff, and at a time when, so far as appears, and as may be presumed, the gravel could have been procured without prejudice to the plaintiff's rights. It cannot be assumed that in giving a direction, in itself perfectly lawful, the defendant authorized or directed the work to be done in an unlawful manner or to an unlawful extent. The defendant neither commanded an illegal act to be done nor co-operated in doing the act which occasioned the injury. The relation of master and servant must subsist between the defendant and those by whose instrumentality the work was done in order to render the defendant liable. But the laborers were not his instruments. As has been said, they were neither selected, employed, paid, nor controlled by him. They were neither his servants in fact nor in law. He cannot, therefore, be liable for their acts: 1 Parsons on Contracts, 86, 90; *Laugher v. Pointer*, 5 Barn. & Cress. 547.

The defense is competent under the general issue. It consists not in a special justification of the acts complained of, but in a denial of the defendant's liability.

The circuit court should be advised accordingly.

ELMER, J. The first question to be determined in this case is, whether the plaintiff has a right of action, upon the facts stated, against any one, for the injury complained of. As to this, I think there can be no doubt that the owner of the soil has a right to the natural support of the soil of the adjacent close, so that if that close is so dug upon as to remove that support, the person who does this is responsible for the damage: *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Harris v. Ryding*, 5 Mee. & W. 60; *Peyton v. Mayor of London*, 9 Barn. & Cress. 725; *Dodd v. Holme*, 1 Ad. & El. 493; *Jeffries v. Williams*, 1 Eng. L. & Eq. 434; *Thurston v. Hancock*, 12 Mass. 220 [7 Am. Dec. 57]; *Panton v. Holland*, 17 Johns. 92 [8 Am. Dec. 369]; *Runnels v. Bullen*, 2 N. H. 534; *Shrieve v. Stokes*, 8 B. Mon. 453 [48 Am. Dec. 401].

The case turns upon the second question submitted to us, namely, Is the defendant liable for the injury complained of?

He was the chairman of the street committee of the common council of the city of Trenton, and the case states that all the work upon the streets is done under their direction. It is a part of their business to procure gravel for the streets, and the defendant purchased of McCall, for the use of the city, gravel to be dug out of his gravel-pit adjoining the plaintiff's land, and he ordered the street commissioner to go upon the McCall lot to procure gravel whenever it was wanted. The excavation which occasioned the plaintiff's land to fall in was done under this order, by laborers employed by and under the immediate direction of Scattergood, the street commissioner. It not being stated that it was necessary, in order to procure the gravel required, to go so near the plaintiff's line as to injure him, or that the defendant was present when the excavation was made, or that he in any way participated in or sanctioned the wrongful acts of the workmen, if he is liable for what they did, it must be on the principle that the workmen were, at the time, acting as his servants, so that he was bound to direct them aright.

A master is responsible for the tortious acts of his servant which were done in his service. This responsibility grows out of, is measured by, begins and ends with, his control over them. If it is his duty to control them in what they do, he is responsible for his neglect. But where workmen do not stand in such relation to the person sought to be charged as to make it his duty to control them, they are not his servants, and he is in no wise responsible for their acts, except in some cases where, by subsequently adopting and sanctioning those acts, he renders himself legally a participator in them. Hence, it has been held by a series of decisions in England, overruling some of earlier date, that an owner, or principal contractor, or master workman, is not responsible for damage occasioned by the wrongful acts of persons employed by a subcontractor or under-workman, or by a person carrying on a distinct independent employment, because they were not his servants, and did not act for him, but for their immediate employer: *Laugher v. Pointer*, 5 Barn. & Cress. 547; *Rapson v. Cubitt*, 9 Mee. & W. 710; *Milligan v. Wedge*, 12 Ad. & El. 737; *Allen v. Hayward*, 7 Ad. & El., N. S., 959; *Peachey v. Rowland*, 16 Eng. L. & Eq. 442. There are American cases of an earlier date which follow the earlier English cases, and carry the liability of the owner or principal contractor somewhat further: *Lowell v. Boston & Lowell R. R. Co.*, 23 Pick. 24 [34 Am. Dec. 33]; *Mayor of New York v.*

Bailey, 2 Denio, 433. But none of them are like this case. The street commissioner was not appointed by or responsible to the committee, but to the common council who appointed them both. Their duties were plainly distinct. The statement in the case, that all the work done in the streets is done under the direction of the committee, can mean no more than that it is their province to decide what streets need repair, to direct the general mode of doing it, to provide suitable materials, and to devolve on the commissioner the oversight of the details which properly belong to him. The commissioner was not selected by the committee as the suitable person to do this on their behalf, but he did it as a distinct independent officer of the municipal corporation. He was in no sense the agent or the servant of the committee, and they were therefore neither responsible for what he or his workmen did, nor for what he or they neglected to do. The defendant did nothing but purchase a right to dig gravel in a proper manner, and to order it to be so dug. Whatever may be the liability of the street commissioner or of the city itself, as to which no opinion is meant to be intimated, he had nothing to do with the subsequent proceedings.

It would be, in my opinion, exceedingly detrimental to the public service to hold an individual, situate as the defendant was, personally responsible for the tortious acts of workmen employed by an officer charged with that special duty, and I should be sorry to find the law to be so. Every member of the common council of the city might be just as well involved in a similar liability. The committee, for the sake of convenience, was for the time substituted in their place, and acted on their behalf. Who would fill such a station if such consequences are to follow? Certainly no one who had any responsibility to put in danger.

In the case of *Nicholson v. Mounsey*, 15 East, 384, the captain of a sloop of war was sued for damages alleged to be done by carelessly running down another vessel at a time when he was not on deck, and when it was not his duty to be there, but that of the first lieutenant, who actually had charge of the sloop. The court held that the captain did not stand in the situation of an ordinary master of a vessel, not having the appointment of the officers and crew, and not responsible for their acts. So it may be said here the defendant did not appoint the street commissioner, nor had he any right to employ or to interfere with the workmen engaged by him. Both the defendant and the commissioner were the common servants of the city, having each

their several duties, and neither was the servant nor in the employment of the other. The case of *Duncan v. Findlater*, 6 Cl. & Fin. 894, is more like the present than any other I have met with. There it was held by the house of lords that the trustees under a public-road act were not responsible for an injury occasioned by the negligence of the men employed by their surveyor in making or repairing the road in accordance with their general directions, the men not being in the situation of servants to the trustees.

Reference was made by counsel on both sides to a class of cases where public officers were not held responsible for the consequences of their own acts or of the acts of their workmen or servants, not done arbitrarily, carelessly, or oppressively, but in the performance of their duty: *The Governor etc. v. Meredith*, 4 T. R. 794; *Sutton v. Clarke*, 6 Taunt. 29; *Hall v. Smith*, 2 Bing. 156; *Boulton v. Crowther*, 2 Barn. & Cress. 703. But these cases are not applicable. They were cases where the officers had the specific duty or the special authority to do the very act complained of, and where they did it, in fact, either themselves or by workmen by them employed. In this case, it was not required of the committee or of the commissioner to get gravel in a particular place, nor was the doing so indispensable to the performance of their particular duties. If the defendant had done the illegal acts complained of, he would have been accountable for the consequences. But as they were done neither by him nor by workmen in his employ and under his control, but by persons who were strangers to him, he is not responsible for them, and the plaintiff was rightly nonsuited.

J. VREDENBURGH, J., concurred.

Order, that the circuit court be advised accordingly.

LATERAL SUPPORT.—For doctrines relative to this subject, and damages to buildings and other improvements on land caused by excavations on adjacent lands, see *Thurston v. Hancock*, 7 Am. Dec. 57, and exhaustive note thereto discussing these questions; *Lasala v. Holbrook*, 25 Id. 524, and collected cases in note to same 527; *Richardson v. Vermont Cent. R. R. Co.*, 60 Id. 283, and note to same 289.

LIABILITY OF PRINCIPAL OR MASTER FOR ACTS OF AGENT OR SERVANT: *Steamboat Co. v. Housatonic R. R. Co.*, 63 Am. Dec. 154, and notes 161; *Moir v. Hopkins*, Id. 312, and extended note to same 315; *Black v. Carrollton R. R. Co.*, Id. 586, and note 589; *Hilliard v. Richardson*, Id. 743; note to *Gillemwater v. M. & I. R. R. Co.*, 61 Id. 108; and exhaustive note to *Hagan v. Providence etc. R. R. Co.*, 62 Id. 379, on liability of principal or master in exemplary damages for act of agent or servant.

EMPLOYER IS NOT GENERALLY LIABLE FOR ACTS OF INDEPENDENT CONTRACTOR: See note to *Hilliard v. Richardson*, 63 Am. Dec. 757, containing references to collected cases on the subject.

THE PRINCIPAL CASE WAS CITED in *Cuff v. Newark & N. Y. R. R. Co.*, 35 N. J. L. 22, to the point that the rule is now firmly established that where the owner of lands undertakes to do a work which in the ordinary mode of doing it is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by a contractor exercising an independent employment and employing his own servants. But when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskillful or improper person as the contractor. And in the same case, p. 24, the language of the principal one relative to the "master's responsibility for the tortious acts of his servant," etc., was quoted.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

WOOD *v.* CHAPIN.

[13 NEW YORK (3 KERNAN), 509.]

DEED IS VALID BETWEEN PARTIES WITHOUT ATTESTATION OR ACKNOWLEDGMENT.

APPOINTMENT OF TRUSTEES, UNDER NEW YORK ABSENT AND ABSCONDING DEBTOR'S ACT, is conclusive evidence that the steps leading to the appointment were regular, provided jurisdiction of the proceeding is shown.

PROCEEDINGS AGAINST ABSENT OR ABSCONDING DEBTOR ARE NOT VITIATED OR CONVEYANCE OF HIS PROPERTY BY TRUSTEES INVALIDATED, by the failure of the officer before whom the proceedings were had to file his report within the statutory time, or by the failure of the trustees to record their appointment within the statutory time; for the statute is directory merely.

TRUSTEES APPOINTED UNDER NEW YORK ABSENT AND ABSCONDING DEBTOR'S ACT take title to his property—not a mere power to convey—and their title dates from the first publication of notice.

TO CONSTITUTE GOOD CONVEYANCE BY WAY OF BARGAIN AND SALE, there must be a valuable consideration expressed in the deed, or proved independently of it; and where it is expressed, it is conclusive. *Per* Denio, C. J.

BONA FIDE PURCHASER OF LAND FOR VALUABLE CONSIDERATION WITHOUT NOTICE of prior unrecorded deeds who records his deed first is protected, though his grantor purchased with notice thereof.

RECITAL IN DEED ACKNOWLEDGING PAYMENT OF CONSIDERATION MONEY is presumptive evidence that the grantee is a purchaser for a valuable consideration, under the recording acts.

PURCHASER WITH NOTICE OF PRIOR UNRECORDED DEEDS IS PROTECTED by the recording act nevertheless, if he purchased from one who was so protected.

PURCHASER OF LAND UNDER JUDICIAL PROCEEDING INSTITUTED BY HIMSELF for the recovery of his debt is a *bona fide* purchaser for a valuable

consideration, within the recording acts, though the whole purchase price is applied upon the debt, and no new consideration is paid except the expenses of the proceedings.

ALL CONVEYANCES IN CHAIN OF TITLE FROM FORMER OWNER need not be recorded in order to protect *bona fide* purchaser whose deed is first recorded against prior unrecorded conveyances from such owner.

TO CONSTITUTE BONA FIDE PURCHASER WITHIN MEANING OF RECORDING ACT, the purchaser must, before he receives notice of the prior unrecorded deed, have advanced some new consideration, or relinquished some security for a pre-existing debt due to him; and the mere receiving a conveyance in payment of a pre-existing debt is not enough.

APPEAL from a judgment in favor of plaintiff in an action of trespass to lands. Both parties claimed title under a former owner named Helm. Helm had conveyed to Fitzhugh, from whom one Smith acquired title; and Smith's title was sold by his trustees, under the absent and absconding debtor's act, to the plaintiff. But Helm's deed to Fitzhugh was not witnessed or acknowledged, and defendant contested its validity on that ground, and also disputed the sufficiency of the record introduced of the appointment of trustees of Smith. Defendant further showed that Helm had given, for a valuable consideration, to Leland and Skinner, a general power of attorney, coupled with an interest, to manage all his lands, and justified entering the lands in question and cutting and removing timber, by virtue of authority from them. Whether the title by deed to Smith, and sale by his trustees, or that of Leland and Skinner, was the better one, was the question in controversy.

Z. A. Leland, for the appellant.

Samuel Beardsley, for the respondent.

By Court, DENIO, C. J. The question presented in this case is strictly one of legal title. The plaintiff deduced a good paper title from William Helm, who is admitted to have been the owner in fee of the premises, unless one or more of the objections interposed by the defendant to the evidence are well taken.

1. The deed from Fitzhugh was not acknowledged, and there was no subscribing witness to it, and consequently it had never been recorded. It is urged that this defect rendered it void: 1 R. S. 738, sec. 137. It was, however, effectual to transfer title as between the parties to it. It would be invalid as against a subsequent purchaser from or an incumbrancer under Helm. But the defendant does not occupy such a position.

2. The plaintiff claims to have acquired the title of Smith by

means of a proceeding under the statute respecting non resident debtors, and the regularity of that proceeding is questioned. The plaintiff proved the application and oath of witnesses required by the statute, the order for the publication of notice to creditors, and the fact of such publication: 2 R. S. 2, secs. 202-206. He also gave in evidence the appointment of trustees, and proved that they took the oath prescribed by the statute. The first-mentioned papers were sufficient to show jurisdiction in the officer, and the act declares that the trustees taking such oath shall be deemed vested with all the estate, real and personal, of the debtor, from the first publication of the notice to him: 1 Id. 41, sec. 6. It is also declared that the appointment of trustees shall be conclusive evidence that the debtor therein named was a concealed, absconding, or non-resident debtor, and that the said appointment and all the proceedings previous thereto were regular: Id. 13, sec. 62. It has been held that this language must be qualified by a condition that the case is one in which the officer had acquired jurisdiction: *Van Alstyne v. Erwine*, 11 N. Y. 331, and cases cited. Jurisdiction being shown in this case, we are bound to hold that the appointment of trustees furnishes conclusive, that is, incontrovertible, evidence that all the other proceedings were in accordance with the statute, and that all the property of which the debtor was seised and possessed at the time of the first publication of the notice was by operation of law vested in the trustees. It was the duty of the trustees to have caused their appointment to be recorded within one month after it was made, and this duty they neglected to perform until nearly three months after the time it should have been done. But the object of this provision was simply to perpetuate the evidence of the transaction, and it cannot be pretended that an omission in this respect would divest the title which had thus been acquired, and render the whole proceeding nugatory. The original appointment of trustees was given in evidence; and should it be held that a record made out of time would not be evidence, it would not affect the validity of the original document. The same remark may be made respecting the report of the judge. If the officer had failed altogether in performing this duty, it would not divest the title of the trustees: *Chautauque Bank v. Risley*, 4 Denio, 454.

3. The defendant's counsel insists that it was incumbent upon the plaintiff to prove the fact of a sale by the trustees to himself. The trustees being clothed with the title to the land, any conveyance by them which would by the common law pass the title

would be effectual wherever the question of title should arise collaterally. The rule would be different if they had possessed only a power to sell and convey the premises, for in such cases all the formalities required by law must in general be observed, or nothing is effected. In this case the premises were shown to have been advertised for sale for the period required by the statute, and the conveyance set forth that due notice of the sale had been given, and that the plaintiff became the purchaser upon a sale at auction. We do not say that the recitals are evidence, but if it were essential to the validity of the conveyance that the purchase should have been made at auction, we are of opinion that the presumption of the due performance of official duty would be *prima facie* sufficient to show that it had been done. Where a levy is necessary in order to give a sheriff authority to sell real estate, the court will presume it to have been made where it is found that he has sold and conveyed the land: *Jackson v. Shaffer*, 11 Johns. 513. I am of opinion that the plaintiff made out a *prima facie* case showing title in himself.

The defendant attempted to show title out of the plaintiff and in Z. A. Leland, under whom he entered and cut the timber. The most favorable view for the defendant which can be taken of the instrument given in evidence by him is to consider it a conveyance of an undivided half of all Helm's property, and an equitable mortgage of the other half to secure any future advances which Leland and Skinner might see fit to make. It would clearly be a conveyance of an undivided moiety of Helm's property, but for the want of a consideration. But no consideration was expressed in the paper, and none was proved outside of it. Leland and Skinner did not undertake to advance anything. They did not execute the deed, and there are no expressions in it by which they were bound to do anything in consequence of their acceptance of it, or which would have amounted to a covenant on their part if they had executed it; and there was no collateral agreement, verbal or written, by which they undertook to advance anything to Helm or to do anything for him. If the deed had any operation, it was by way of bargain and sale under the statute of uses. No livery of seisin is pretended to have been given, and there was no such relationship between the parties as is necessary to support a covenant to stand seised. A bargain and sale before the statute of uses rested on the goodness of the consideration, and hence it was that a consideration became the great point upon which deeds of conveyance turned, which were invented after the statute in order to raise and con-

vey uses: Reeves's Hist. Eng. Law, 162, 163, 353, 355; *Rec'or of Chedington's Case*, 1 Co. 154; *Wiseman's Case*, 2 Id. 15; Shep. Touch., c. 10, p. 5. It is perfectly well settled in this state, that to constitute a good conveyance by way of bargain and sale there must be a valuable consideration expressed in the deed, or proved independently of it. If one is expressed, no proof of its actual payment need be given, and it cannot be controverted by evidence, and it is sufficient, though the amount be merely nominal: *Jackson v. Alexander*, 3 Johns. 484 [3 Am. Dec. 517]; *Jackson v. Fish*, 10 Id. 456; *Jackson v. Florence*, 16 Id. 47; *Jackson v. Sebring*, Id. 515 [8 Am. Dec. 357]; *Jackson v. Cadwell*, 1 Cow. 622. It is no doubt true that the insertion of a consideration has become a mere ceremonial observance. It is, however, a form required by law where there is no evidence of an actual consideration, and we have no more right to dispense with it than with any other legal requirement. I am of opinion, therefore, that the deed was void for want of a consideration. It was executed before the enactment of the revised statutes, and we are not therefore called upon to consider the effect of the provision which the legislature has made respecting grants of freehold estates: 1 R. S. 738, secs. 136, 137.

But whatever might have been the effect of the deed to Leland and Skinner at the common law, I am of opinion that it has become invalid as against the plaintiff by the operation of the recording acts. Helm, the source of title, conveyed to Fitzhugh, and he conveyed to Thornton. Neither of these grantees could hold the land against the prior grantees of Helm, for the former had knowledge of the prior deed, and the latter did not cause his deed to be recorded. But Thornton conveyed to Smith for a pecuniary consideration, expressed in the deed, and acknowledged to have been paid; and Smith put his deed on record. Smith was not prejudiced by the knowledge which Fitzhugh had of the conveyance to Leland and Skinner. If one affected with notice conveys to another without notice, the latter is as much protected as if no notice to either had ever existed: *Jackson v. Given*, 8 Johns. 137 [5 Am. Dec. 328]; *Varick v. Briggs*, 6 Paige, 323, 329. Smith acquired Fitzhugh's title, by means of the conveyance of the latter to Thornton and of Thornton's conveyance to him, as effectually as though Fitzhugh had conveyed directly to Smith. It was unnecessary for the plaintiff to prove that Smith paid a consideration. The acknowledgment in the deed of the payment of a consideration is, uncontradicted, sufficient evidence of the fact of such payment: *Jackson v. Mo-*

Chesney, 7 Cow. 360 [17 Am. Dec. 521]. If Smith acquired a good title against Leland and Skinner by virtue of the recording acts, as I have shown he did, the plaintiff would be entitled to protection, though he had purchased with full notice of the prior deed. It is not material, therefore, to consider whether the plaintiff's purchase, under the attachment proceedings instituted by himself, constituted him a *bona fide* purchaser, within the construction which has been given to the recording acts. It is enough that the purchase from the trustees gave him the title which Smith had. Smith's title being perfect against Leland and Skinner, the plaintiff, being clothed with that title, can hold the land against them: *Varick v. Briggs*, *supra*; *Jackson v. McChesney*, *supra*. I am moreover of opinion that a purchaser under judicial proceedings instituted by himself, though the purchase be made on account of the debt for the recovery of which the proceedings were had, is a *bona fide* purchaser within the statute. The legal expenses necessarily incurred, which have to be advanced by the party promoting the proceeding, are something in addition to the existing debt which the purchaser has parted with as a consideration for the conveyance which he receives.

If these views are correct, the case was properly disposed of in the supreme court, and the judgment appealed from should be affirmed.

COMSTOCK, J. The defendant committed the trespasses complained of, claiming under a contract for the purchase of the land from Leland, dated March 4, 1848. Assuming that the instruments executed by Helm to Leland and Skinner on the thirtieth of November, 1825, conveyed to them a title, or an interest (Leland having afterwards purchased of Skinner), then the question arises whether the plaintiff is protected in his title under the recording act as a *bona fide* purchaser.

Fitzhugh, the immediate subsequent grantee of Helm, would not be protected against the prior unrecorded grant to Leland and Skinner, for the reason that he had actual notice of their title. Neither would Thornton, the grantee of Fitzhugh, be protected, because his conveyance was never duly recorded. A subsequent purchaser takes no benefit under the recording act unless his deed is first recorded. The deeds, however, from Thornton to Smith, and from the trustees of Smith, as a non-resident debtor, to the plaintiff, were duly recorded before the instruments above mentioned from Helm to Leland and Skinner. The plaintiff has therefore complied with that condition

of the statute, and his title must prevail against Leland's unless there is some other difficulty in the way.

There is no difficulty arising out of any actual notice of the adverse title. The notice which Fitzhugh, the immediate grantee of Helm, had, does not affect any one purchasing under him without notice: *Jackson v. Elston*, 12 Johns. 452; *Varick v. Briggs*, 6 Paige, 323; *Jackson v. Van Valkenburgh*, 8 Cow. 260; and it is pretended that the plaintiff or Smith, whose title he has acquired, were not *bona fide* purchasers, so far as this point is concerned.

It is said that all the conveyances, from Helm down to the plaintiff, must be recorded before the prior one to Leland and Skinner, in order to bring the case within the recording act; and inasmuch as the deed from Fitzhugh to Thornton, constituting one link in the chain, does not appear on the records, it is insisted that Leland's title must prevail. It is true, I believe, that under the statute a prior recorded deed is notice only to a subsequent purchaser from or under the same grantor, and consequently that such a purchaser only is within the protection of the statute if the prior deed is not recorded: *Raynor v. Wilson*, 6 Hill, 469; *Murray v. Ballou*, 1 Johns. Ch. 566; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; but I do not find any authority for saying that all the conveyances in the chain of the junior title must be recorded, when the last grantee asserting such title is himself a purchaser in good faith, and has his own deed recorded in due time. In the present case, the plaintiff not only traces his title in fact back to Helm, the common source, but the record shows Helm to have been the source, although one of the conveyances in the series is not recorded. The deeds from the trustees of Smith to the plaintiff, and from Thornton to Smith, which were duly recorded, both describe the premises as conveyed by Helm to Fitzhugh, and by Fitzhugh to Thornton on the fifteenth of September, 1835; the deed to Thornton being the one not on record. If, therefore, the plaintiff examined the title when he purchased, the record would carry him back to Helm as the origin. The plaintiff, therefore, I have no doubt, must be regarded as a subsequent purchaser under the same grantor as Leland, and having first recorded his own deed, he is protected both by the letter and policy of the act.

But a subsequent grantee, to entitle himself to the benefit of the statute, must not only buy without notice, and put his deed first on record, but he must also purchase for a valuable consideration. I think the plaintiff must be regarded as such a

purchaser. He and two others were jointly the attaching creditors of Smith, and on the sale of the premises by the trustees, he alone was the bidder and buyer. There was no other property attached and sold, and consequently all the expenses of the proceeding were payable out of this bid. Beyond that, the plaintiff either paid the money over to the trustees, or applied his bid in extinguishment of so much of the debt; and in that case he was of course accountable to his associates for two thirds of the amount. His relations were therefore changed by the transaction, and he must be deemed a purchaser for a valuable consideration.

Some objections were made on the trial to the validity of the proceedings on the attachment against Smith, under which the plaintiff claims title. One of these was, that the appointment of the trustees was not recorded within one month from the time it was made, as the statute requires: 2 R. S. 12, sec. 61. Another was, that the report of the judge before whom the proceedings were had was not made and filed within the time directed: Id. 13, sec. 68. These statutes are directory merely, and the omission to comply with them strictly does not vitiate the proceedings. Another objection was that the attachment itself was not shown. But the judge's report of the proceedings recited the process as issued by him in due form, and the statute declares that such report "shall be conclusive evidence that the proceedings stated therein were had" before the officer. Such being the effect given by statute to the report of the judge, it was unnecessary to go behind it for proof of any matter therein set forth. Some other objections were mentioned, but they do not require a special consideration. On examination of the proceedings, and comparing them with the statutes under which they were had, there appears to be no doubt of their validity. The point was made on the trial that the deed from Fitzhugh to Thornton, constituting one of the links in the plaintiff's title, was void, as against the title of Leland, on the ground that it was not duly acknowledged, and had no attesting witness. The statute, 1 R. S. 738, sec. 137, declares that a deed "not so attested shall not take effect as against a purchaser or incumbrancer until so acknowledged." Such a deed is, however, good between the parties to it, and we think it is only a subsequent purchaser or incumbrancer who can take the objection. If the formalities of attestation or acknowledgment had been duly attended to, still the prior conveyance (if such we call it) to Leland and Skinner would prevail, but for the operation of the

recording statute. The section referred to clearly implies that the deed would take effect against a purchaser or incumbrancer, if acknowledged or attested; but as such could not be the effect as against a prior conveyance or incumbrance, the inference would seem to be plain that the statute has no application to such a case.

Some other questions were presented on the argument, but if they were all determined in the defendant's favor, it would not change the result. Under the views which have been stated, the plaintiff made out a title to the premises, and the finding and judgment in his favor were therefore right.

The judgment should be affirmed.

HUBBARD, J. The plaintiff is entitled to recover in this action, provided he, or any one through whom he derived title, can be regarded as a purchaser of the premises on which the trespass was committed, in good faith and for a valuable consideration. Whatever estate Leland may have had, whether an absolute title to one half, and a power coupled with an interest as to the other half, or whether the power extended to the entire premises, it was equally subject to the operation of the registry act.

The question then is, Was the plaintiff or his predecessors in title, or any of them, a *bona fide* purchaser for a valuable consideration? The plaintiff can stand upon his own purchase, or that of any one through whom he traces title back to the common source. If any one of them stands in the attitude of a *bona fide* purchaser, and is entitled to the protection of the registry act, then the plaintiff should recover, as the conveyance to Leland and Skinner was not recorded until after those under which plaintiff derives title, with the exception of the one to Thornton.

Fitzhugh was not a *bona fide* purchaser; he had actual knowledge of the outstanding conveyance to Leland and Skinner. The conveyance to Thornton was never recorded, and he, therefore, would not be protected against the prior conveyance. But Thornton conveyed to Smith, from whom the plaintiff immediately derives title. This conveyance, which is in the ordinary form, expresses a consideration of two thousand dollars, and was properly acknowledged and recorded. There is no pretense that Smith knew of any outstanding title or equity in Leland and Skinner. He purchased in good faith, and the receipt of the consideration in the deed of his grantor is *prima facie* evidence of payment of the sum expressed: *Jackson v. McChesney*, 7 Cow. 30 [17 Am. Dec. 521]. Under the recording act, there-

fore, Smith was presumptively a *bona fide* purchaser for a valuable consideration, and the plaintiff succeeded to all his rights. The premises being wild and unoccupied land until after the time the plaintiff acquired his title, there is no ground for any constructive notice of an outstanding title.

It was insisted, upon the argument, that the plaintiff's title must fail because of the want of a link in the chain; because the deed from Fitzhugh to Thornton was not acknowledged, and had no subscribing witness, as required by the statute: 1 R. S. 738, sec. 137. The delivery of the deed signed by Fitzhugh was not disputed. It seems to me that neither the defendant nor Leland and Skinner stand in a position to raise any question under the statute. The statute only applies to subsequent purchasers, and not to those deriving title from the main grantor prior in time. A conveyance which has no subscribing witness, and which is not acknowledged at the time of its delivery, is not rendered *ipso facto* void by the statute; it is simply declared to have no effect as against a purchaser or incumbrancer, until acknowledged. The deed operates to transfer the title, as between the parties, subject to rights subsequently acquired by third persons.

In view of the right of the plaintiff, under the title of Smith, it may not be essential to inquire whether he can himself be regarded a *bona fide* purchaser for a valuable consideration. There is no suggestion that his purchase was not in good faith; that he was not entirely ignorant of any claim or title outstanding. As to the consideration paid, I do not see any reason why the receipt of the payment of the consideration expressed in his deed from the trustees in the insolvent proceedings against Smith should not have the same force and effect as the receipt in a conveyance directly *inter parties*. But aside from this, I think the plaintiff showed affirmatively that he did pay a valuable consideration. It is well settled that in order to constitute a *bona fide* purchase for a valuable consideration, within the meaning of the recording act, the purchaser must, before being notified of the prior equity of the holder of an unrecorded deed, have advanced some new consideration or relinquished some security for a pre-existing debt due to him. The mere receiving a conveyance in payment of a pre-existing debt is not enough: *Dickerson v. Tillinghast*, 4 Paige, 215 [25 Am. Dec. 528]; 4 Kent's Com. 168.

In this case no security for an existing debt was relinquished. The plaintiff obtained his deed under the statutory proceeding against Smith, an absent debtor. I do not perceive how the

case is distinguishable from that of a conveyance obtained by virtue of a statutory sale by a sheriff on execution. The validity of a sheriff's deed against a prior unrecorded conveyance by the judgment debtor has been repeatedly recognized, and I think properly: *Parks v. Jackson*, 11 Wend. 442 [25 Am. Dec. 656]; *Tuttle v. Jackson*, 6 Id. 213 [21 Am. Dec. 306]. The two methods of sale and conveyance are analogous; both are judicial or statutory proceedings. It is true, the plaintiff, who was the creditor of Smith, or one of the creditors, paid no new consideration at the sale except the expenses attending the proceedings. The real consideration was the debt; the costs were but an incident. Under the recording act it should be held that, in effect or equitably, the creditor purchasing upon a judicial sale, on his own judgment, or in an insolvent proceeding to collect his debt, pays the amount of his bid to the officer, and, in theory, receives it back again. In other words, it should be held in equity that the land is converted into money, and the conveyance made in consideration of the money thus advanced.

None of the objections made at the trial as to the validity of the attachment proceedings are well taken. The statute which requires the officer before whom the proceedings against an absent debtor are pending to report to the supreme court within twenty days after the appointment of trustees, and to file the same, is merely directory. The report, when made, is rendered by statute conclusive evidence of all the facts which it contains: 2 R. S. 13, sec. 68. Its recitals, therefore, proved all the proceedings, including the issuing of the original attachment, and all formal matters of regularity up to the appointment of trustees. There was no claim that the report of the judge was defective in any respect; at least, no objection was made that its recitals were not full and complete.

The requirement of the statute that the trustees shall cause their appointment to be recorded within one month is simply directory: 2 R. S. 12, sec. 61. An entire failure to record would not affect the validity of the sale made by them of the debtor's property.

The judgment of the supreme court must be affirmed.

All the judges were in favor of affirmance, except MITCHELL, J., who did not hear the argument, and took no part in the decision.

ATTESTATION AND ACKNOWLEDGMENT OF DEED IS NECESSARY ONLY AS TO SUBSEQUENT PURCHASERS AND INCUMBRANCERS, and it is valid between the parties without these formalities: *White v. Leslie*, 54 How. Pr. 398; *Wiles v.*

Peck, 26 N. Y. 48. A mortgage, if "a grant in fee or of freehold estate," under the revised statutes requiring attestation and acknowledgment, is good between the parties, though not attested or acknowledged: *Payne v. Wilson*, 11 Hun, 305, all citing the principal case to this effect; see *Floyd v. Ricks*, 58 Am. Dec. 374, and note.

ACTS OF PUBLIC OFFICERS PRESUMED TO BE REGULAR: *Commonwealth v. Slifer*, 64 Am. Dec. 680; *Squier v. Stockton*, 52 Id. 583; *Farr v. Sims*, 24 Id. 396; *Terry v. Bleight*, 16 Id. 101; *Hartwell v. Root*, 10 Id. 232; see *Pennington v. Yell*, 52 Id. 262. A sheriff's deed is presumptive evidence that the sheriff performed his duty in giving the notices required by law; for the neglect of duty by a public officer will not be presumed, but must be proved; and when a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shown: *Clute v. Emmerich*, 21 Hun, 123; *Wood v. Morehouse*, 45 N. Y. 376, citing the principal case. But the recital of a vital jurisdictional fact, such as the appointment under statute of commissioners to make partition, made by the commissioners, is not evidence of the regularity of their appointment: *Munro v. Merchant*, 26 Barb. 395, citing the principal case.

TIME WITHIN WHICH PUBLIC ACT IS TO BE PERFORMED BY STATUTE is a directory, not a mandatory, provision: *St. Louis County Court v. Sparks*, 45 Am. Dec. 355; note to *People v. Cook*, 59 Id. 472. Therefore a literal observance of the direction as to time is not indispensable to the validity of the act: *Matter of N. Y. Elevated R. R. Co.*, 7 Hun, 241. A provision of statute requiring general assignments for the benefit of creditors to be acknowledged by the assignor before delivery, and schedules to be made within twenty days thereafter, is directory merely: *Fairchild v. Gwynne*, 14 Abb. Pr. 128. But though a statute made in the affirmative, without any negative expressed or implied, does not take away the common law, yet a statute providing that every assignment for the benefit of creditors shall be executed in a certain prescribed manner is not a mere affirmative or declarative statute, but implies a negative that no assignment can be made in any other way: *Hartman v. Bowen*, 5 Abb., N. S., 335; S. C., 39 N. Y. 198—all citing the principal case.

BONA FIDE PURCHASER WITHOUT NOTICE FROM ONE WITH NOTICE OF PRIOR UNRECORDED DEED.—Though an original purchaser is affected with notice of a prior deed, yet if he conveys to another without notice, the latter is as much protected as if no notice had been received by either: *Webster v. Van Steenberg*, 46 Barb. 215. The recording statutes have changed the common law to the extent that a bona fide purchaser of real estate from a vendor charged with notice of a prior unrecorded conveyance can obtain a better position than his vendor only by recording his conveyance first, and thus getting priority upon the record: *Westbrook v. Gleason*, 79 N. Y. 31. A subsequent purchaser, spoken of in the recording act, is one who takes his deed after the actual execution of a deed to another, and who takes his deed without knowledge, actual or constructive, of the existence of such deed, and records his own deed first; and he will be protected when his chain of title is first on record, although the intermediate grantees were chargeable with bad faith: *Fallase v. Pierce*, 30 Wis. 461. Where the property of a husband is conveyed to the wife by means of conveyances properly recorded and apparently regular, but really fraudulent and void, a bona fide purchaser from the wife, whose deed was first recorded, and who had no notice of the defect in the wife's title, would be protected against a purchaser at a sheriff's sale of the land as the property of the husband, whose deed was not recorded until

afterwards: *Hoxie v. Price*, 31 Wis. 89—all citing the principal case. A purchaser for value, without notice of the fraud in his vendor, stands upon as high ground in equity as any other creditor or *cestui que trust*: *Hunter v. Lawrence's Adm'r*, 62 Am. Dec. 640, note 647; *Hoffman v. Noble*, 39 Id. 711, and note collecting prior cases 716.

PURCHASER FROM ONE WHO IS PROTECTED BY RECORDING ACT, as against a prior unrecorded conveyance of the same land, is himself entitled to such protection, notwithstanding he purchased with notice of the prior conveyance, or without parting with a valuable consideration: *Webster v. Van Steenberg*, 46 Barb. 214; *Lacustrine etc. Co. v. Lake Guano etc. Co.*, 82 N. Y. 484; *Bell v. Twilight*, 45 Am. Dec. 367, and note citing prior cases 371. The title of a *bona fide* purchaser for a valuable consideration inures as such to the benefit of his grantee, though the latter had notice of the claims of devisees under a will, and did not pay a valuable consideration: *Cole v. Gourlay*, 79 N. Y. 532; S. C., 9 Hun, 495. One who is protected by the recording acts may convey good title as against those whose deeds are recorded before such conveyance: *Page v. Waring*, 76 N. Y. 469. The New York cases cite the principal case. But in general, a purchaser with notice of an unrecorded deed holds subject to that deed, though his own deed be first recorded: *Van Rensselaer v. Clark*, 31 Am. Dec. 280; *Draper v. Bryson*, 57 Id. 257, and cases cited in the note 265; *Price v. McDonald*, 54 Id. 657; *Vose v. Morton*, 50 Id. 750, and note.

PURCHASER AT JUDICIAL SALE INSTITUTED BY HIMSELF MAY BE BONA FIDE PURCHASER, within the recording acts. A *bona fide* purchaser at an execution sale, even though he be the execution creditor, will take the estate free from unrecorded deeds and prior equities of which he has no notice: *Rooker v. Rooker*, 75 Ind. 577, citing the principal case. At a sale under proceedings had in the surrogate's court for the payment of debts due by a decedent a purchaser bought land, paying therefor the whole purchase price. Although he was a debtor of the decedent, the purchase price was not applied directly upon the debt, but he actually parted with the consideration money. He was held to be a *bona fide* purchaser within the recording acts, and the case was said to be much stronger than the principal case: *Barto v. Tompkins etc. Bank*, 15 Hun, 13.

BONA FIDES OF PURCHASE AS AFFECTED BY NATURE OF CONSIDERATION UNDER RECORDING ACTS—PRE-EXISTING DEBT.—To constitute a *bona fide* purchaser within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded deed, but he must have received the same upon some new consideration advanced at the time, or must have relinquished some security for a pre-existing debt due him. If the consideration be a pre-existing debt, the purchaser will not be protected: *Pickett v. Barron*, 29 Barb. 508, citing the principal case; *Padgett v. Lawrence*, 40 Am. Dec. 232, and note 240; *Willis v. Henderson*, 38 Id. 120; *Bush v. Bush*, 51 Id. 675. One is not a *bona fide* purchaser within the meaning of the recording acts when the only consideration he gives for his deed is a mortgage without a personal covenant on the property conveyed for the entire purchase price, and it appears that he would be in as good a position as he was in before he purchased if the unrecorded deed were declared paramount: *Schroeder v. Gurney*, 10 Hun, 417, citing the principal case. To constitute a *bona fide* purchaser, full payment of the consideration must be made before notice of the adverse equity is received: *Union Canal Co. v. Young*, 30 Am. Dec. 212, and cases cited in the note 225.

RECITAL IN DEED AS EVIDENCE OF PAYMENT OF CONSIDERATION.—The principal case is cited to the point that a recital in a deed of the payment of

a consideration is presumptive evidence of that fact: *Vorebeck v. Roe*, 50 Barb. 304; and if uncontradicted, is sufficient: *Dooper v. Noelke*, 5 Daly, 416. But in *Bolton v. Jacks*, 6 Robt. 234, 235, after examination of the authorities upon which the principal case was based in this respect, it was said that it was not authority that the consideration clause in a deed is sufficient in all cases, if uncontradicted, to establish the purchase for a valuable consideration by the grantee of the property conveyed thereby, as against a person claiming either adversely to such grantee or under the grantor by a title prior to the execution of such conveyance. The rule of the principal case, it was said, was confined to cases arising under the recording acts. In *Hoyle v. Jones*, 31 Wis. 404, it was said, citing the principal case, that bad faith or notice of the plaintiff's adverse title or want of consideration, which would defeat the conveyance to the defendant's grantor, were affirmative facts which it is incumbent upon the plaintiff to prove. And in this case the plaintiff's claim was under a prior unrecorded deed. A subsequent conveyance expressing a sufficient consideration and acknowledging its payment is evidence of a *bona fide* purchase for value to defeat a title claimed by another grantee under a prior unrecorded deed: *Ring v. Steele*, 4 Abb. App. Dec. 69; *Lacustrine etc. Co. v. Lake Guano etc. Co.*, 82 N. Y. 483. In *Shotwell v. Harrison*, 22 Mich. 420, 426, it is held, Campbell, J., dissenting, that the recital in a recorded deed of the payment of a consideration is not *prima facie* evidence of that fact. There is no reason for assuming that the value of lands conveyed is less than the sum stated in the deed: *Meeker v. Wright*, 7 Abb. N. C. 301; S. C., 76 N. Y. 265. The recitals in an undertaking required by the code for the discharge of an attachment reciting the commencement of an action, the issuing of the attachment, the making of an application to discharge the same, estop the signers of the undertaking from contradicting them for the purpose of defeating the instrument: *Coleman v. Bean*, 14 Abb. Pr. 44. The recital of a consideration would be of no avail against the statutory presumption of fraud created in favor of creditors of the chattel mortgagor, or subsequent *bona fide* purchasers, where the chattel mortgagor is allowed to retain possession of the goods, but the mortgagee must give some evidence of the *bona fides* of the mortgage, the consideration, and good motives of the parties: *Allen v. Cowan*, 28 Barb. 106. All the above cases cite the principal case. The recital of the payment of a consideration in a deed is not evidence of that fact as against third parties: *Bolton v. Johns*, 47 Am. Dec. 404, and cases cited in the note 408. Contradicting by parol the recital of consideration: See *Swafford v. Whipple*, 54 Id. 408, and cases cited in the note 503; *Burleigh v. Coffin*, 53 Id. 236; *Groves v. Steel*, 46 Id. 551; *Beach v. Packard*, 33 Id. 185.

BLOSSOM v. GRIFFIN

[13 NEW YORK (3 KERNAN), 569.]

PAROL EVIDENCE OF ORAL NEGOTIATIONS LEADING TO WRITTEN INSTRUMENT is incompetent to influence its construction.

RULE EXCLUDING PAROL EVIDENCE TO AFFECT WRITTEN CONTRACTS does not reject an antecedent parol agreement of a different character, and imposing a very different, but not inconsistent, obligation.

IN CONSTRUING WRITING, IT IS PROPER TO LOOK AT ALL SURROUNDING CIRCUMSTANCES, the pre-existing relation between the parties, and then to see what they mean when they speak.

ONE WHO IS BOTH CARRIER AND WAREHOUSEMAN IS LIABLE AS CARRIER for goods deposited in warehouse as a mere accessory to the carriage; that is, deposited for the purpose of being carried without further orders; and his responsibility as carrier begins from the time of the receipt of the goods.

RECEIPT GIVEN BY PARTIES WHO WERE CARRIERS AS WELL AS FORWARDERS stated that goods were received to be forwarded. The goods were burned in the warehouse before carriage commenced. *Held*, that the signers were responsible as carriers, not as forwarders only. The receipt did not exclude evidence of the circumstances under which it was given, and of an antecedent parol agreement to carry plaintiff's goods generally, and these showed that the words "to be forwarded" were not used in a technical sense.

APPEAL from a judgment for plaintiffs in an action against carriers for loss of goods. The facts appear in the opinions.

John L. Talcott, for the appellants.

J. L. Curtenius, for the respondents.

By Court, COMSTOCK, J. The goods in question were delivered to the defendants on the third of July, and during that night were burned without fault or negligence on their part. If at that time they were liable as forwarders only, they are not responsible for the loss. If, on the other hand, their liability as carriers had attached, then they must pay for the goods; and this is the question to be determined.

The defendants were both carriers and warehousemen. In such a case, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, in other words, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received: *Angell on Carriers*, secs. 75, 131. So of an innkeeper, who is also a carrier by land; if he receives goods into his inn to be carried, he is liable as a carrier for any loss which may happen before they are put in transit: *Id.*, sec. 133; *Hyde v. Trent etc. Nav. Co.*, 5 T. R. 389.

In this case it appears that the plaintiffs were in the habit of sending their goods from Buffalo to New York, to be sold by their consignees. In the spring before the fire happened, they had agreed with the defendants to be their carriers, at a price which included both freight and warehouse charges; and under this agreement the defendants from time to time received goods from the plaintiffs at their storehouse and carried them through to New York. The referee has also found, as matter of fact, that the goods in question were received under this agreement.

They were therefore received for transportation, and within the principle which has been stated, were there nothing else in the case, it would be very plain that the defendants became liable as common carriers.

It has been urged, however, that the receipt which the plaintiffs took from the defendants on delivering the goods, declaring that they were received to be forwarded to the consignees, is conclusive against any theory of liability as carriers. The objection, I think, cannot prevail. It may be granted that the writing is more than a mere receipt; that it imports an agreement, and is therefore within the rule which excludes parol evidence where contracts are reduced to writing. But the rule itself is not quite so broad as the terms in which it is commonly stated would seem to imply. It only excludes any other evidence of the language used by the parties in making the contract than that which is furnished by the instrument itself: 1 Greenl. Ev. 316, 321. It excludes the colloquium or oral negotiation leading to the very contract which the parties consummate by reducing it to writing; but it does not reject an antecedent parol agreement of a different character, and imposing a very different but not inconsistent obligation. The defendants, as before stated, were carriers, and as such they were under a parol agreement to carry the plaintiffs' goods generally, and those in question in particular. Their storehouse was the place where they were in the habit of receiving goods for that purpose, and where their liability as carriers commenced. Now, although we concede that, looking at the receipt only, the goods were taken in to be forwarded in the strict and technical sense of the term, yet the defendants, in virtue of the antecedent agreement, were to take them from the storehouse as carriers, and transport them to New York. Keeping in view, then, the rule already stated, their liability as carriers at once attached. Unless it can be shown, therefore, that a forwarder's receipt cancels or in some way swallows up his antecedent agreement to take the same goods as a carrier, whether the latter engagement be by parol or in writing, the defense must fail; and I think that cannot be shown.

But the receipt itself, in my opinion, admits of a different interpretation from that which has been thus far conceded. In construing this, as every other writing, it is proper to look at all the surrounding circumstances, the pre-existing relation between the parties, and then to see what they mean when they speak. If no facts had been shown outside of the receipt itself,

it might and probably would have imported simply an obligation to deliver the goods to some safe and responsible carrier, to be transported to their destination. But calling in the aid of all the circumstances, viewing the defendants also as carriers, and looking at their existing obligation to the plaintiffs, a fair exposition of the language used is that the property was to be "forwarded," not in the exact and technical sense which excludes the idea of transportation, but to be carried forward to its destination as marked on the goods, and expressed in the receipt by their own line of conveyance, according to their antecedent agreement. There is no rule which requires the words of a contract to be construed in their technical sense. In general, the rule is the reverse: 1 Greenl. Ev., sec. 317; and there is certainly no necessary meaning of the phrase "to forward" which excludes the interpretation suggested. There can be no doubt that this was what the parties intended, and I am quite clear that in adopting such a construction we do no violence to the language in which they expressed themselves.

The judgment should be affirmed.

T. A. JOHNSON, J. The writing given by the defendants on receiving the goods in question, on its face, and without any evidence in regard to the business in which they were engaged, would not certainly and unequivocally amount to anything more than a mere receipt for the goods. The terms "to be forwarded" would not in that case necessarily import an undertaking on their part either to send or carry the goods to any place for the persons who delivered them. It became necessary, therefore, in order to enable the court to determine the true import of these terms in the connection in which they were used, and to ascertain what the parties intended by them, to show in what business they were engaged, and to what subject-matter the writing applied to prove some extrinsic facts. Had nothing been shown beyond the facts that the plaintiffs were manufacturers of goods of that description, for sale in the usual course of trade, and that the defendants were warehousemen and forwarders, the writing would undoubtedly, in the light of such facts alone, be held to import clearly an undertaking on the part of the defendants to deliver the goods at the earliest opportunity to some trusty and responsible carriers, who should engage on the usual terms to carry and deliver them at the place of destination to the persons to whom they were addressed or consigned. In such a case it is clear that the defendants could not be held

liable for any damage or loss happening in the manner the loss in question is found to have happened. But whenever it becomes necessary for the court, in order to interpret an instrument, to resort to proof of extrinsic facts at all, it ought to hear all the facts and circumstances legitimately bearing upon the subject to which the instrument relates. It should then surround itself with all the material facts and circumstances which surround the parties at the time, and occupy as nearly as possible their position. Hence proof of the other facts connected with this transaction became not only important, but absolutely necessary to enable the court to perform its duty of interpreting the writing and determining the true intent and meaning of the terms employed. And when the additional facts came to be established, that this was not an isolated transaction between the same parties; that the defendants, in addition to being warehousemen and forwarders, were common carriers also; that in the spring previous to the loss in question they had agreed with the firm, of which the plaintiffs are members and assignees, to carry their goods to and from New York at a specified price per hundred; and that they had from time to time before this received goods of said firm at their warehouse, where the goods in question were delivered, to be carried under the general arrangement—it became apparent that the writing was not necessarily a distinct and independent agreement in reference to this particular parcel of goods by which the defendants were to act as forwarders merely. In the light of all these facts and circumstances, the terms “to be forwarded,” instead of importing an absolute and unqualified undertaking on the part of the defendants to deliver the goods to some carriers who should undertake to transport them, amount merely to an acknowledgment of the purpose for which the goods had been delivered by the owners, that is, to be forwarded or carried by the defendants themselves under the existing arrangement. Such is the natural and reasonable import of the terms employed, in view of all the surrounding facts and circumstances. The writing is not a new undertaking, changing pre-existing relations, but mere evidence that the parties were carrying out and performing the prior agreement, which embraced all the necessary terms and conditions. The goods having been delivered to the defendants to be forwarded or carried by them under their prior agreement immediately on the first opportunity, without further orders from their owners, they became responsible as carriers the moment the goods came fully into their possession, and are consequently

liable for the loss in question: Angell on Carriers, secs. 75, 131, 134; Story on Bailm., sec. 536; Edwards on Bailm. 446-449.

The admission of evidence of extrinsic facts upon the trial, and the application of the facts established to the instrument by way of interpretation, were in no respect in conflict with the rule which forbids the introduction of parol evidence to contradict or vary written instruments.

The judgment of the supreme court should therefore be affirmed.

DENIO, C. J., A. S. JOHNSON, SELDEN, and HUBBARD, JJ., were also for affirmance.

MITCHELL, J., was for reversal.

WRIGHT, J., did not hear the case argued and took no part in the decision.

ORAL NEGOTIATIONS ANTECEDENT TO UNAMBIGUOUS WRITTEN CONTRACT ARE INADMISSIBLE TO CONTROL CONTRACT: *Melton v. Watkins*, 60 Am. Dec. 481; *Palmer v. Fogg*, 58 Id. 708; *Glendale W. Co. v. Perpetual I. Co.*, 54 Id. 309; *Davis v. Ball*, 53 Id. 53; *Pack v. Thomas*, Id. 135; *Rearish v. Swinehart*, 51 Id. 540, and note citing prior cases 546.

EVIDENCE OF PAROL AGREEMENT TOUCHING SAME SUBJECT IN CONSTRUING WRITTEN AGREEMENT: See *Hersom v. Henderson*, 53 Am. Dec. 185, and note 187; *Bennett v. Bell's Adm'r*, 64 Id. 260. In *Barber v. Brace*, 8 Id. 149, a parol agreement was not allowed to be set up to show the terms on which goods were received for transportation since the written receipt contained the agreement of the parties. The principal case is cited to the point that instruments made by the parties at the same time and relating to the same subject-matter should be interpreted by the court, not the jury; and in so doing, the court should read and construe them together as parts of a single transaction, and not as instruments alien in their origin, object, or subject-matter: *Dudgeon v. Haggart*, 17 Mich. 280.

SURROUNDING CIRCUMSTANCES AND PRE-EXISTING RELATIONS OF PARTIES CONSIDERED IN CONSTRUING CONTRACT: *Wilson v. Troup*, 14 Am. Dec. 458. Parol evidence is admissible in explanation of a written contract to show the situation of the parties, the object in view, and the consideration, but not to contradict or control the same: *Baldwin v. Carter*, 42 Id. 735. Parol evidence is admissible to vary the legal operation of a contract, where it is brought out on cross-examination, showing the circumstances under which the contract was made: *Bank v. Fordyce*, 49 Id. 561. In construing a written instrument, it is proper to look at all the surrounding circumstances, the pre-existing relation between the parties, and then to see what they mean when they speak: *Matter of the N. Y. C. R. R. Co.*, 49 N. Y. 419. Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described: *Goddard v. Foster*, 17 Wall. 143. Parol proof may be given of

any or all the circumstances surrounding the transaction showing the relation of the parties to each other, their knowledge of the subject-matter of the contract, the state or condition of that subject-matter as bearing on the intention of the parties which may suggest a meaning where none was apparent before, or which may show what construction shall be placed upon the language used which is susceptible of more than one interpretation: *Phelps v. Clasen*, 3 Bank. Reg. 23. Where the language of an instrument is ambiguous and susceptible of more than one construction, that construction will be adopted which, in the light of surrounding circumstances and upon a view of the whole instrument, is in accordance with the apparent intent of the parties: *Springsteen v. Samson*, 32 N. Y. 706. But the rule of viewing a contract in the light of surrounding circumstances is a rule of interpretation merely, and does not permit the making of a new contract or a reformation of it, or a disregard of its terms. It authorizes only a just construction of those terms and a fair inference as to the common understanding of both the contracting parties: *Clark v. Woodruff*, 83 N. Y. 522. The pre-existing relation between the parties, as that of agency, may be shown in construing a contract: *Richards v. Millard*, 1 Thomp. & C. 251. Receipts given for money to be applied in a certain way, given to a wife, are not conclusive as to her ownership of the money; but they are susceptible of any explanation not inconsistent with the contract contained in them as to the appropriation of the money; and thus the husband may be shown to be the real owner thereof: *Brouer v. Vandenburg*, 31 Barb. 649. Although a letter be addressed to a single member of a firm, yet if, when read in the light of surrounding circumstances, it appears to have been intended to authorize an act of the firm, it will be sufficient to confer authority upon the firm: *Barney v. Worthington*, 4 Abb. Pr., N. S., 209; S. C., 37 N. Y. 115. An indemnity bond given to a sheriff may be read in the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties: *Bancroft v. Winspear*, 44 Barb. 211; *Griffiths v. Hardenbergh*, 41 N. Y. 469; *Clark v. Woodruff*, 83 Id. 522.

In determining the amount of salary which was to be paid to one employed under a contract, the principle of the admission of surrounding circumstances, and the pre-existing relations of the parties, was applied: *Coughtry v. Levine*, 4 Daly, 336. An instrument by the terms of which a person was to have the sole right to sell the goods manufactured by a firm, with a commission of five per cent, may be shown by parol evidence to have been intended not to operate as a contract between the parties, but to enable the person to obtain advances upon the manufactured goods; and another rate of compensation may be shown to be the real one due such person: *Grierson v. Mason*, 1 Hun, 113; S. C., 3 Thomp. & C. 188; S. C. affirmed on appeal, 60 N. Y. 398. It is proper to look at all the surrounding circumstances and the pre-existing relation between the parties in construing any writing, and thus an agreement may be implied that the value of services rendered under an express agreement be applied upon the account existing between the parties, though the employing party fails and assigns before the completion of the service: *Myers v. Davis*, 26 Barb. 372. Where in an action on an insurance policy the defense is made that the structure was used for purposes and contained things classed as extra hazardous, parol evidence is admissible to prove that the insurers, before issuing the policy, had for a long time insured the structure for benefit of its prior tenants, who had occupied it for the same purposes, and that the insurers knew the structure and its uses: *Mayor etc. of N. Y. v. Exchange Fire Ins. Co.*, 3 Abb. App. Dec. 266;

S. C., 34 How. Pr. 107. In determining the meaning of the word "floor" in an insurance policy, accompanying circumstances are admissible: *N. Y. Belting and Packing Co. v. Washington Fire Ins. Co.*, 10 Bosw. 433. In determining whether a policy was for the joint or undivided interests of the parties insured, the policy may be read in the light of surrounding circumstances: *Petney v. Glens Falls Ins. Co.*, 61 Barb. 340. Where two persons are made parties of the second part in a lease, it was permissible to show by parol that one of the persons signed as surety, and that this was known to the lessor: *Knowles v. Cuddeback*, 19 Hun, 592. All the above cases cite the principal case.

LIABILITY OF ONE WHO IS BOTH CARRIER AND WAREHOUSEMAN for goods deposited with him. One who is both carrier and warehouseman, who receives goods into his warehouse as a mere accessory to the carriage and not subject to any particular order of the owner, or if they are deposited for the purpose of being carried farther, is responsible as a carrier: *Ladue v. Griffith*, 25 N. Y. 367; *Coyle v. Western R. R. Corp.*, 47 Barb. 154; *Fitchburg etc. R. R. Co. v. Hanna*, 66 Am. Dec. 427. Where after receiving the goods on storage the carriers received orders from the owner to forward the goods to his vendee, and these orders the carriers received and accepted, the carriers are liable as such to the vendee from the time of the acceptance of the orders to forward: *Wade v. Wheeler*, 3 Lans. 204. If anything remained to be done to the goods by the shipper before they are ready for transportation, or if any orders, directions, or instructions were to be given before they were to be forwarded, the liability of carrier does not attach: *Railroad Co. v. Barrett*, 36 Ohio St. 453. The plaintiff agreed with a New York firm that he would fill with cider certain casks furnished by the firm, have them loaded upon cars, take a receipt therefor, and send that with a draft for the price to the purchasers. After some of the casks had been delivered to the defendant railroad company, and while it was waiting for enough to fill a car, some of them were found to be missing. It was held that the title to the cider did not vest in the purchasers until a car was loaded and a receipt taken; that until that time the defendant's liability as common carriers did not commence, and therefore the plaintiff could not maintain an action for the cider: *Gilbert v. New York Central etc. R. R. Co.*, 4 Hun, 380; S. C., 6 Thomp. & C. 665. The rule that when goods transported by a railway company have arrived at their destination and have been stored in a warehouse by the company its liability as carrier is terminated does not apply where the goods were consigned to a point beyond the company's route, and where it is a usage of the company to deliver the goods to the next carrier: *Hooper v. Chicago etc. R'y Co.*, 27 Wis. 92. An intermediate carrier in a continuous line of transportation does not relieve himself from liability by simply unloading the goods at the end of his route and storing them in his warehouse without delivery or notice to, or any attempt to deliver to, the next carrier: *McDonald v. Western R. R. Corp.*, 34 N. Y. 503. Where the defendant carriers received at their elevator, through which they received grain for carriage and which they also used as a warehouse, grain from a connecting carrier, to be carried over their line, without directions or agreement for its storage, they were liable as common carriers for the grain while in the elevator: *Rogers v. Wheeler*, 6 Lans. 429; see *Ladue v. Griffith*, 25 N. Y. 367. In *Wood v. Milwaukee etc. R'y Co.*, 27 Wis. 552, it was held that the intermediate carrier's liability as such for goods transported over his line and deposited in a warehouse at the end thereof continued until the goods were ready for delivery to the next carrier and he has had a reasonable time to

take them away, and if not removed within a reasonable time the carrier would be liable as a warehouseman only. But this decision was overruled in *Conkey v. Milwaukee etc. Ry Co.*, 31 Id. 631, and it was said, *per* Dixon, C. J., that the first carrier would have his remedy against the next carrier in case of his failure to remove the goods within due time. The above cases cite the principal case. The liability of a railroad company as carrier and as forwarding agent is not the same: *Maybin v. South Carolina R. R. Co.*, 64 Am. Dec. 753.

FORD v. WILLIAMS.

[13 NEW YORK (3 KERNAN), 577.]

CHattel MORTGAGE CANNOT BE IMPEACHED BY EVIDENCE THAT MORTGAGOR, AFTER EXECUTING IT, EXECUTED MORTGAGES of the same property to other persons, which were fraudulent towards his creditors.

CHattel MORTGAGE ON STOCK OF GOODS WHICH PERMITS MORTGAGOR TO CONTINUE BUSINESS, make sales of the goods, and use the proceeds as his own, is void *per se*, for fraud towards creditors, unless the proceeds are applied to the mortgage debt, in which case it may be upheld.

ATTORNEY DOES NOT MAKE HIMSELF LIABLE AS TRESPASSER by communicating to the sheriff on behalf of his client instructions to levy an execution upon specified property afterwards proved not to be the property of the execution debtor; nor by executing, in his client's name and by his authority, a bond of indemnity to the sheriff.

BOND OF INDEMNITY UNDER SEAL, EXECUTED BY ATTORNEY WHOSE AUTHORITY WAS BY PAROL, is valid against his client as a simple contract, without regard to the seal.

FACT THAT ATTORNEY EXECUTES FOR HIS CLIENT BOND OF INDEMNITY UNDER SEAL, when his authority is by parol, does not make him personally liable for the wrongful taking of goods by the sheriff, since the specialty is binding upon his client as a simple contract.

APPEAL from a judgment for damages for taking and carrying away personal property. The property in question was a stock of goods in the store and set of furniture in the house of one Sutherland, who gave a chattel mortgage upon them to plaintiffs, but was allowed to continue his sales; he, however, swore that this permission was conditioned on his applying the proceeds to the mortgage debt, and that he did so. The goods were seized and sold by the sheriff on an execution against the mortgagor, which was the trespass complained of. The action was brought against the attorney who directed the execution proceedings. There were verdict and judgment for plaintiffs, and defendant appealed. A subsequent decision in the cause on somewhat different proofs is reported in 24 N. Y. 359.

Nicholas Hill, jun., for the appellant.

B. Davis Noxon, for the respondents.

By Court, DENIO, C. J. The judge was, in my opinion, correct in excluding the evidence offered to show that Sutherland, after giving the mortgage to the plaintiffs, executed mortgages upon the same property to other persons, which were fraudulent as to his creditors. These subsequent mortgages were given about a month after the plaintiffs' mortgage, and it was not offered to be shown that they had any knowledge of them. The rule contended for by the defendant's counsel would place it in the power of a debtor, who had in entire good faith given a security to a creditor for an honest debt, by his own act to create evidence which might invalidate the security without any fault on the part of the creditor. The only influence which such evidence could have upon the minds of the jury would be to create a belief that as the debtor was shown to be capable of a dishonest act, very probably his transaction with the plaintiff was induced by the same bad disposition. This would not be a legal inference, but a bare conjecture. Contemporaneous acts of the parties to a conveyance alleged to be fraudulent may in general be shown; but these subsequent mortgages were not connected as to time with the plaintiffs' security. I do not perceive that the fact that Sutherland was permitted to sell the goods by retail has any influence upon this particular question. That circumstance did not aid him in making the fraudulent mortgages. Had he even been out of possession, he could have again mortgaged the equity of redemption for an honest purpose, and the subsequent mortgagee could have redeemed the prior mortgage. The possession of Sutherland, and the power of disposition in other respects which he was allowed to exercise over the property, presented another question, but did not tend to render his fraudulent conduct, in giving the other mortgages, evidence against the plaintiffs.

The defendant clearly had a right to show, upon the question of fraud, that the value of the goods mortgaged to the plaintiffs was disproportioned to the amount of their debt. It might tend with other circumstances to show an intention to hinder and embarrass the other creditors of Sutherland by covering up his property. But I do not think the evidence which the judge excluded could have been understood to be offered with that view. The offer was to show that the sheriff left goods enough, which were included in the plaintiffs' mortgage, to satisfy their debt. The apparent object was to show that the plaintiffs were not injured, because they might still realize the amount of their demand out of the goods which remained. It could not, I think,

have occurred to the judge that the motive was, as now argued, to show the aggregate amount of the property levied on with a view to contrast that amount with the debt intended to be secured. It was not contended on the argument that the evidence was material for any other purpose, and it clearly was not. The plaintiffs' mortgage was forfeited before the seizure by the sheriff, and they had become the owners of the property embraced in it.

This court has decided that where, upon the giving of a chattel mortgage on the stock of goods in a store, the mortgagor is permitted, by the assent of the mortgagee, to continue to sell them by retail at his discretion for his own use as he had done before, the mortgage is fraudulent and void against the creditors of the mortgagor: *Edgell v. Hart*, 9 N. Y. 213 [59 Am. Dec. 532]. There was considerable evidence in this case to bring it within the principle of that decision; but Sutherland's testimony tended in some degree to show that his sales, subsequent to the mortgage, were made in pursuance of an arrangement between the parties that Sutherland might dispose of the goods for cash, and apply it on the plaintiffs' debt, and that he applied the money in that way. The judge was requested to charge in accordance with the doctrine upon the subject which we laid down in *Edgell v. Hart, supra*; and he responded to that request by saying that such was the effect of the charge which he had given. The defendant, therefore, had the benefit of the rule to the extent of having it laid down correctly to the jury. If they failed to find in accordance with it, the error is one of fact, which we cannot review.

The judgment ought, therefore, to be affirmed unless an error was committed in that part of the charge which related to the defendant's complicity in the alleged trespass. The defendant was allowed the benefit of the position, that he would not be responsible for conveying to the sheriff the instructions of his clients to seize the goods in question, if he did nothing more. That was the view of the judge, and in that I think he was correct. In general, all who aid and abet the commission of a trespass are liable jointly or severally at the election of the party entitled to the action. But where one acts only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass, he is not liable, though what he does may aid another party in its commission. The rule was carried far enough when it was held that the sureties in an indemnity bond, of a party wishing to

procure property to be seized upon legal process, were responsible in trespass, the seizure being unwarrantable: *Davis v. Newkirk*, 5 Denio, 92. I do not affirm that that case was incorrectly decided; for there was force in saying that all the obligors in the bond might be held to have requested the seizure; but the principle clearly would not extend to the scrivener who drew the bond, or the attorney who made out the execution, though they knew the purpose to which they were to be applied. Upon the same principle which shields the attorney, who simply conveys to the officer the instructions of his clients, I should hold that where the party directing the seizure finds it convenient to empower his attorney to execute the instrument of indemnity in his name and behalf as his agent, the attorney so executing as agent would not be a party to the seizure, so as to make him a trespasser, if it should turn out to be unwarranted; and such I understand to have been the view of the judge. He assumed that the act of executing the bond as attorney would be harmless, provided the defendant had sufficient authority from the principles. But the instrument which the defendant did execute was under seal, and his authority was an unsealed letter. Clearly he could not under that authority execute a specialty, and he therefore exceeded his authority. The judge instructed the jury that if he had gone beyond his authority in this regard, that circumstance alone made him liable, if the plaintiffs in other respects were entitled to recover. Now, although he could not, under the letter which his clients wrote to him, bind them by a covenant, the power was ample to enter into a written promise, on their behalf, to indemnify the sheriff; and the paper which he signed in their names sufficiently expressed the consideration to render the agreement valid without regard to the seal; and this court has decided that in such cases the instrument is valid as a simple contract, though executed under seal, provided the law did not require the particular contract or conveyance to be a sealed instrument: *Worrall v. Munn*, 5 N. Y. 229 [55 Am. Dec. 330]. The question then arises whether the fact that the attorney used a seal when he had no right to do so, and when that circumstance did not impair the contract which he made—that contract being, after all, the precise one which he was authorized to make—so changes his relation to the seizure as to render him liable to the plaintiffs as a party aiding or abetting its commission. I am of opinion that it does not. If he would not have been liable had he executed the paper in form as a simple contract, or if executing it

as he did his authority had been under seal, I do not think the formal defect in the execution of the paper will make him responsible. I do not perceive that this circumstance in any way affected the plaintiffs. It is merely a question between the defendant and the sheriff. The latter did not get an instrument of the precise legal character which he supposed he received, but the one he did get gave him a remedy against the principals substantially the same as though it had been a specialty. The principle upon which an indemnitor is made liable in those cases is, that the instrument is equivalent to a request to make the seizure. This instrument concluded the plaintiffs in the execution from denying that they requested the seizure. It conveyed to the sheriff their request to make the levy as effectually as though the seals had not been affixed to it. The defendant was simply their agent to put that request in writing in their names, and this he effectually did, though not in the exact legal form which they contemplated. If I am correct in this view, the judgment ought to be reversed and a new trial granted.

COMSTOCK, J., having been counsel in the cause, took no part in the decision.

Judgment reversed.

FRAUD IN CONVEYANCE IS NOT PRESUMED BECAUSE OF FRAUDULENT CONVEYANCE soon afterwards made between the same parties: *Bumpas v. Dotson*, 46 Am. Dec. 81.

AGREEMENT BETWEEN MORTGAGOR AND MORTGAGEE OF CHATTELS THAT FORMER SHALL CONTINUE IN POSSESSION, and that while thus in possession he shall sell the goods from time to time and pay over the proceeds to the latter, is not unlawful or fraudulent *per se*: *Conkling v. Shelley*, 28 N. Y. 363. If it is made clearly to appear that upon the giving of the mortgage the mortgagor was permitted, by the assent of the mortgagee, to continue to sell the goods at retail, at their discretion, and for their own use, the mortgage will be fraudulent, but the mere fact that the mortgagor for a time retained possession, and during this period made sales, is not conclusive, but merely a fact to be considered by the jury upon the question of fraud: *Williston v. Jones*, 6 Duer, 507; *Davis v. Ransom*, 18 Ill. 396. The above cases cite the principal case. So a mortgage is not fraudulent *per se*, though it provides that the mortgagor may make sale, and apply the proceeds to his own use, where he promises that if he makes large sales he will replace the goods so sold, and where the property mortgaged is more than sufficient to pay the debt: *Briggs v. Parkman*, 37 Am. Dec. 89, and note 94; so in *Bumpas v. Dotson*, 46 Id. 81, and see note thereto 85; notes to *Harding v. Coburn*, Id. 686; *Ranlett v. Blodgett*, 43 Id. 606; but see note to *Pulcifer v. Page*, 54 Id. 595. The question of the fraudulency of a chattel mortgage, where the mortgagor is left in charge, is for the jury: *Ostrander v. Fuy*, 2 Keyes, 588, citing the principal case.

SO LONG AS ATTORNEY ACTS STRICTLY IN EXECUTION OF DUTIES OF HIS PROFESSION, and does not actually participate in the commission of the trespass, he is not liable with his client for the trespass; but when he steps beyond that line and actively aids his client in the execution of his purpose he is not shielded from responsibility. Therefore he would be liable when he employed workmen and instructed them to remove certain fixtures wrongfully, and paid them for it: *Schalk v. Kingsley*, 42 N. J. L. 33, citing the principal case. An attorney is liable for suing out void process upon which a party is arrested. So, where he does so maliciously and without probable cause: Note to *Bissell v. Gold*, 19 Am. Dec. 493.

EXECUTION OF SEALED INSTRUMENT BY AGENT HAVING PAROL AUTHORITY ONLY does not bind principal if the instrument requires a seal; but if no seal is necessary, the instrument is valid as the simple contract of the principal: *Worrall v. Munn*, 55 Am. Dec. 330, and note 343. Where the contract made by agents of the corporation would have bound the corporation if it had been a parol contract, the fact that the agents signed it with their seals will not invalidate it as against the corporation, but it will be sustained as a simple contract: *Haight v. Sahler*, 30 Barb. 223, citing the principal case. It was held in *Fullam v. Inhabitants of West Brookfield*, 9 Allen, 6, that where a town authorizes a committee to bind them by contract, and the committee enter into a sealed contract in their individual names as "committee for the town," such contract does not bind the town, but the individuals who sign it. And Metcalf, J., in delivering the opinion of the court, said: "*In Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. 285 (recognized in *Worrall v. Munn*, 5 N. Y. 229, and *Troy v. Williams*, 13 Id. 585), it was decided that when an authorized agent makes a contract in his own name and under his private seal, which contract is for the sole benefit of the principal, and which is not required to be under seal, it is to be deemed the simple contract of the principal, on which the proper action against him for a breach thereof is *assumpsit*. . . . We are now asked to adopt the doctrine of the foregoing cases, so far as to sustain the present action of contract against the defendants. This we cannot do. The doctrine is anomalous, and was resorted to by the courts of New York in consequence of their having rejected the common-law remedy against the agent personally, and for the purpose of giving some remedy against the principal, which the plaintiff would not otherwise have. As we adhere to the common-law remedy in a case like the present, the plaintiff needs no new remedy, and can have none at our hands." The unnecessary addition of a seal to an instrument by an agent authorized by parol will not vitiate it: *Worrall v. Munn*, 55 Am. Dec. 330, note 343. Authority to execute a sealed instrument must be under seal, and ratification of such an act must be of the same character: *Drumright v. Philpot*, 60 Id. 738; note to *Worrall v. Munn*, 55 Id. 343.

LIABILITY ON INDEMNITY BOND FOR UNLAWFUL SEIZURES: See *Hutchinson v. Lord*, 60 Am. Dec. 381. Judgment creditors who direct the sheriff to sell property assigned by the judgment debtor in trust for the benefit of creditors, and who indemnify him for so doing, are jointly liable with the sheriff to the assignee for such illegal act: *Ball v. Loomis*, 29 N. Y. 417. Indemnitors are liable for an unlawful seizure of the property named in the bond; but where the bond indemnifies against seizing a safe, the indemnitors will not be liable for the improper seizure of property contained in the safe, unless they knew that the safe could not be taken without its contents: *Chapman v. Douglas*, 15 Abb. Pr., N. S., 426; S. C., 5 Daly, 250, both citing the principal case.

RATIFICATION OF CONTRACT FOR SALE OF LANDS MADE BY AGENT IN HIS OWN NAME.—In *Squier v. Norris*, 1 Lans. 287, it was held that where a contract for the sale of lands is made by an agent in his own name, without disclosing the agency, the contract is not binding upon the principal, nor would the contract be ratified and made binding by a receipt of a portion of the purchase money by the principal, and his subsequent parol promise to be bound by the contract, and though the principal case, with others, was urged upon the court as authority to the point that a party cannot repudiate the acts of an agent performed without authority, where they have been subsequently ratified, and some benefit has been derived from them, it was said that these cases were not authority to the extent that a parol agreement for the sale of real estate may be a ratification of the contract made by another party: See *Newton v. Bronson*, *infra*, and note.

NEWTON v. BRONSON.

[13 NEW YORK (3 KEERNAN), 587.]

NEW YORK COURT OF APPEALS CANNOT, IN EQUITY SUIT, REVIEW QUESTIONS OF FACT determined by the supreme court.

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LANDS SITUATED IN ANOTHER STATE will be decreed by chancery against a resident within the jurisdiction duly served.

CODE PROVISION THAT ACTIONS CONCERNING LAND SHALL BE TRIED IN COUNTY WHERE LAND IS SITUATED does not remove jurisdiction to decree specific performance of contract for sale of lands without the state, since it does not apply to lands not situated in any county of the state.

EXECUTOR CANNOT, AS EXECUTOR MERELY, CONVEY LANDS IN ANOTHER STATE, but may do so in virtue of a power given in the will; and in so doing, he acts as donee of a power, and not under an authority conferred by the surrogate.

EXECUTOR CANNOT DELEGATE TO AGENT DISCRETIONARY POWER TO SELL LANDS.

CONTRACT FOR SALE OF LAND OF ESTATE MADE BY ANOTHER THAN EXECUTOR, who has power to sell lands, is made valid when the executor ratifies it, with full knowledge of the facts, since in ratifying he exercises the discretionary powers of his personal trust.

WRITTEN CONTRACT FOR SALE OF LANDS MADE BY UNAUTHORIZED AGENT may be ratified by parol, as the original authority might be given by parol; and in either case the statute of frauds is satisfied.

WRITTEN CONTRACT FOR SALE OF LANDS MADE BY ONE TO WHOM SUCH POWER COULD NOT BE DELEGATED, as by one assuming to act for an executor who is by the will donee of a power to sell, may be validated by ratification, but the ratification must be in writing, to satisfy the statute of frauds.

INSTRUMENT ITSELF NEED NOT BE SIGNED BY PARTY, TO SATISFY STATUTE OF FRAUDS, but it is sufficient if he signs some writing that refers to and accepts the instrument as his contract.

APPEAL from a judgment ordering specific performance of a contract to sell and convey land. The defendant was executor

of the former owner of the land, which lay in Illinois. Brokers acting in his name negotiated a sale of it, which the executor approved; but owing to a dispute arising about sufficiency of payment, he refused to convey, raising the objections considered in the opinions. The court below decreed a conveyance, and he appealed. The appeal was submitted.

J. Larocque, for the appellant.

I. S. Newton, for the respondent.

By Court, DENIO, C. J. This action was commenced subsequent to the enactment of the code of procedure, and all the proceedings therein are subject to its provisions. It was tried by the court without a jury. The question principally discussed in the printed briefs submitted by the counsel is, whether the purchase money mentioned in the contract for the sale of the premises in question was fully paid up by the plaintiff as assignee of the original vendee. Whether it was entirely paid or not depends upon the question whether the sum of thirty-three dollars and fifty cents, charged by Messrs. Ogden & Jones for their services respecting the mortgage of Erastus Newton, and deducted from the money paid by Isaac S. Newton to them, was properly retained by those gentlemen, or whether it ought to have been applied on the contract. This depends upon a variety of evidence, written and oral, and was purely a question of fact. There is no statement of facts found; but it is apparent from the judgment, as well as from the opinion of the judge before whom the case was tried at special term, that this sum was by the court allowed to the plaintiff on account of the moneys payable by his contract. The determination of questions of fact in this class of cases belongs to the supreme court, whose judgment upon such questions we have no authority to review: *Dunham v. Watkins*, 12 N. Y. 556; *Griscom v. Mayor etc. of New York*, Id. 586. We shall therefore assume, as the supreme court has adjudged, that the whole purchase price of the land contracted for was paid. There are, however, certain questions of law which arise upon the pleadings and the conceded facts, which are properly before us.

1. The contract was for the purchase of lands lying in the state of Illinois, but the parties are residents of this state, and subject generally to the jurisdiction of its courts. The defendant's counsel insists that the court below had no jurisdiction in such a case to decree a specific performance. It is not denied but that such a jurisdiction existed in the court of chancery,

nor but that it passed to the supreme court by the provisions of the present constitution. That concession could not be avoided consistently with a settled course of adjudication: *Massie v. Watts*, 6 Cranch, 148; *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *Ward v. Arredondo*, 1 Hopk. Ch. 213; *Mead v. Merrill*, 2 Paige, 402; *Mitchell v. Bunch*, Id. 606 [22 Am. Dec. 669]; *Sulphen v. Fowler*, 9 Id. 280. The cases in the English court of chancery will be found referred to by Chancellor Walworth in the last of these cases. The doctrine thus established is that this court, having jurisdiction of the person of the defendant, will, by its process of injunction and attachment, compel him to do justice by the execution of such conveyances and assurances as will affect the title of the property in the jurisdiction within which it is situated. The present supreme court possesses the jurisdiction formerly exercised by the court of chancery: Const., art. 6, sec. 3; Laws 1847, p. 325, sec. 16. The reliance of the defendant's counsel is upon section 123 of the code. That provision relates to "the place of trial in civil actions," and declares that certain actions shall be tried in the county in which the subject of the action or some parts thereof is situated, subject to the power of the court to change the place of trial. Among the actions enumerated are such as are brought "for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest." The latter branch of the statute is vague and indefinite, but the language is comprehensive, and it may perhaps embrace suits for a specific performance of contracts for the sale of lands where they are situated in this state. It has been so held in the superior court of the city of New York, and I am inclined to assent to the views of that court: *Ring v. McCoun*, 3 Sandf. 524. Conceding that it is sufficiently broad to embrace such suits, it clearly has no application to cases where the subject of the action does not lie within any county in this state. The object of the section is to determine the venue in the classes of actions to which it refers, and it does not profess to limit or define the jurisdiction of the court. It is sought to be implied from it that where, in the actions enumerated, the subject of the controversy does not lie in some county in this state, no action whatever will lie. This would be a very violent implication. When the legislature determines to abolish any portion of the jurisdiction of the superior courts of this state, we may expect that it will be done in direct and unequivocal language, referring to that particular subject, and that the pro-

visions will not be found lurking under a remote implication drawn from provisions relating to the place of trial. This objection to the judgment under review is untenable.

2. It is argued that the defendant's office of executor does not extend to the lands in Illinois, upon the principle that letters testamentary and of administration have no force beyond the jurisdiction in which they are granted: *Shultz v. Pulver*, 11 Wend. 372. Hence it is said the defendant cannot effectually perform the judgment of the supreme court, not being able, as it is insisted, to affect the title to lands out of this state. But the authority of the defendant in respect to real estate is not conferred by the probate court. He is the donee of a power at common law and under the statute; and although it was by the will made a condition to his acting under the power that he should qualify as executor, when he has performed that condition he acts in conveying the lands as the devisee of a power created by the owner of the estate, and not under an authority conferred by the surrogate: *Conklin v. Egerton*, 21 Wend. 430, 436.

3. It is urged by the defendant's counsel that the contract of sale is void for the reason that it was made by an agent of the defendant, according to the maxim, *Delegatus non potest delegare*. The rule of law no doubt is, that a power of this kind is a personal trust and confidence, which cannot be committed to another than the grantee or the donee of the power: *Berger v. Duff*, 4 Johns. Ch. 369. Besides this difficulty, the defendant in his answer denies that the agents who executed in his name the contract which the plaintiff seeks to enforce had any authority, in fact, from him to execute it, and the plaintiff has failed to show any power of attorney or other express authority from him to them. The last objection is fully overcome by ample and repeated acts of acknowledgment and ratification by the defendant of the contract in question, in writing as well as by parol. The evidence upon this point was quite sufficient to enable the court to decide that the agents were authorized by parol to execute the contract, and a parol authority under our statute and under the statute of Illinois, which is identical in its provisions, would be sufficient. The contract itself must be in writing, but where it is signed by an agent, the power to execute it may be by parol: *Lawrence v. Taylor*, 5 Hill, 107, 112; *Champlin v. Parish*, 11 Paige, 405; *McWhorter v. McMahan*, 10 Id. 386. That a subsequent ratification is equally effectual as an original authority is well settled: *Weed v. Carpenter*, 4 Wend. 219; Story on Agency,

secs. 239, 244, 250, 252-256; *Episcopal Society v. Episcopal Church*, 1 Pick. 372; *Corning v. Southland*, 3 Hill (N. Y.), 552, 556; *Moss v. Rossie Lead Mining Co.*, 5 Id. 137; *Clark v. Van Riemsdyk*, 9 Cranch, 153; *Willinks v. Hollingsworth*, 6 Wheat. 241; *Lawrence v. Taylor*, *supra*. But it may be said that this principle is scarcely broad enough to answer the plaintiff's purpose. If a person ratifies the act of one who has assumed to be his agent, the effect of the transaction, according to the books, is the same as if he had actually given him direct authority in the premises to the extent to which such act reaches. Here the objection is that the defendant could not bind himself in his representative character by any agent, however fully authorized. If, therefore, the acts of ratification which are proved in this case are no more than an equivalent to a power of attorney executed by the defendant before the contract was signed by his agents, the objection that the defendant could not delegate his own delegated authority is not answered. The reason of the maxim, *Delegatus non potest delegare*, however, is, that in the cases to which it applies the first constituent has a right to the personal judgment, care, and skill of his agent.

Assuming that Ogden & Jones in this case acted without authority from the defendant, the latter had a right, when the contract came to his knowledge, either to repudiate or to confirm it. In determining upon one or the other course, he brought into exercise those personal qualifications on account of which he is presumed to have been selected by the testator. The law does not allow him to commit the power with which he is intrusted to another, for perhaps that other would bind the estate to a transaction which the former might not have considered advantageous and safe if he had acted directly upon it. The reason fails where the person actually intrusted with the authority has, with a full knowledge of the facts, ratified the act of one who has assumed to act as his agent. But if the acts of ratification rested wholly in parol, there would still remain a formal difficulty. The plaintiff (aside from the equitable doctrine arising out of a part performance) must show a contract in writing, subscribed by the defendant or his lawful agent. The execution of the contract by Ogden & Jones, in the name of the plaintiff, goes for nothing, not because they had no power to execute, for that is remedied by the ratification, but because the act was one which could not be done by attorney; and though the defendant, with a full knowledge of the terms of the contract, elected to abide by it, that election would not answer the exigency of

the statute, which requires the contract or some note or memorandum of it to be in writing, and subscribed by the party or his agent lawfully authorized. The ratification in such a case must be authenticated in the same manner as though it were an original contract made by the defendant. But the plaintiff is relieved from the embarrassment presented by this view of the case by the letters of the defendant which were given in evidence. The one dated June, 1850, refers to the contract by its date, and the name of the vendee, and it contains a description of the premises intended to be conveyed. The rule is well established in the English courts, that where a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it contains in itself the terms of the contract, or refers to some writing which contains them: *Sugd. Vend.*, c. 3, sec. 3; *Dobell v. Hutchinson*, 3 Ad. & El. 355; *Jackson v. Lowe*, 1 Bing. 377. It is a reasonable rule, and not liable to the objection that it lets in the frauds and perjuries which the statute was intended to guard against. It was never required that the vendor and vendee should sign at the same time, or upon the same identical paper. The revisors proposed that the security to be given for the purchase money should be executed at the same time with the agreement to convey, to avoid what they considered an evil, namely, the doctrine "that a letter or other writing, though written subsequently to the making of the agreement," would take a case out of the statute: 3 R. S., 2d ed., 655. The legislature, however, did not adopt this view; but instead of the section proposed, re-enacted the provision in the language of the act of 29 Car. II., c. 3, and of our former act, only changing the word "signed" to "subscribed," and requiring the consideration to be expressed: 1 R. S. 135, secs. 8, 9. In this case the agreement was subscribed within the full meaning of the word, for it was written at the bottom of the writing intended to be authenticated. The mischief which it was intended to prevent by using the word "subscribed" was a course of decisions which held that the name of the party written in any part of the agreement, though in a manner not intended to authenticate the paper, was held a sufficient signing: *Clason v. Bailey*, 14 Johns. 484; *Davis v. Shields*, 26 Wend. 341. This was not a case of that kind. The signature to which I propose to give effect was a subscription.

I am in favor of affirming the judgment of the supreme court.

The other judges concurred in the above opinion, with the exception of T. A. JOHNSON and MITCHELL, JJ., who dissented.

Judgment affirmed.

POWER OF COURT TO COMPEL PARTY TO CONVEY LANDS OR DELIVER PROPERTY, OR TO SURRENDER OR BRING BEFORE COURT CHILDREN OR OTHER PERSONS WITHIN HIS CONTROL BUT SITUATE IN ANOTHER STATE.—The courts of a state or nation have no jurisdiction beyond the limits of the sovereignty of the state or nation whose laws it is their duty to interpret and enforce. The jurisdiction of the state courts is confined within the state lines, and beyond these limits their process has no effect: Freeman on Judgments, sec. 564; Story's Conf. L., sec. 539; *Lovejoy v. Alber*, 54 Am. Dec. 630; *Ewer v. Coffin*, 48 Id. 587; *Western Union Tel. Co. v. Pacific Tel. Co.*, 49 Ill. 90; note to *Myers v. Myers*, 58 Am. Dec. 692. "It seems to be generally, and perhaps universally, conceded that by no means can a citizen of one state be compelled to go into another state to litigate a civil action by means of process served in his own state; and that even though process from the courts of any state be personally served beyond the limits of the state whence it issued, no personal liability against the defendant can result therefrom which will be recognized beyond the state in which the action originated." Freeman on Judgments, sec. 564. So in the case of land or other property situated without the jurisdiction of the court. It can be affected, generally speaking, only by a judgment or decree of a court within the jurisdiction of which it is situated; and the judgments of other courts are of no avail in transferring the title to property thus situated, or in otherwise affecting it.

Courts of equity, however, as they act upon the person primarily, or, as the old authorities have it, deal "with the consciences" of persons within their jurisdiction, have not been confined to subject-matter situate within the boundary lines of their jurisdiction. *Æquitas agit in personam*; and by means of its power over the person of a party it may compel him to perform acts relative to subject-matter within foreign jurisdiction, on penalty of being subjected to the process of equity attachment and sequestration. Personal jurisdiction is the primary jurisdiction, though it may not be the only proper jurisdiction, of equity, and there may be no essential or fundamental reason why it should not act directly *in rem*: Pomeroy's Eq. Jur., sec. 135. But it is in consequence of its power over the person that equity is enabled to effectuate justice with respect to subject-matter situate in a foreign sovereignty; for, *per se*, its decrees could have no validity or force over such property.

JURISDICTION OF EQUITY OVER LAND AND PROPERTY IN FOREIGN JURISDICTION.—Upon the grounds just stated, equity has long exercised this kind of jurisdiction. One of the earliest cases was between historical personages: *William Penn v. Lord Baltimore*, 1 Ves. sen. 444; and the court therein decreed the specific performance of articles executed in England and concerning the boundaries of the then colonies of Maryland and Pennsylvania. In *Derby v. Athol*, Id. 202, the court held that it might consider the right and title to the Isle of Man, where the equitable rights of the parties thereto were involved. A plea to the jurisdiction of a bill praying relief from a grant of an annuity or rent-charge upon lands in Ireland, alleged to have been fraudulently obtained, was overruled in *Arglase v. Muschamp*, 1 Vern. 75; S. C., Id. 135; though Ireland, like the Isle of Man, was not within the

jurisdiction of the court. The lord chancellor was apparently much chagrined at question being made of his jurisdiction, and his language is often cited. "This is surely a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local; so would wholly elude the jurisdiction of this court." And he overruled the plea to the jurisdiction, and ordered the defendant to pay costs for endeavoring to oust the court of its jurisdiction.

The jurisdiction of equity, acting in *personam* over subject-matter beyond the jurisdiction of the court, is now established beyond cavil, when it once properly acquires jurisdiction of the equities involved. Therefore, when the court has acquired jurisdiction of the parties in a matter of proper equitable cognizance, it may, by acting in *personam*, compel the conveyance of interests in real property, the assignment of choses in action, or the bringing of personal property within the jurisdiction, or may administer other relief in the furtherance of justice, notwithstanding the property or interest involved may be situated without the state: *Portarlington v. Soulby*, 3 Myl. & K. 104, 108; *Foster v. Vassall*, 3 Atk. 589; *Archer v. Preston*, 1 Eq. Cas. Abr. 133, c. 3, cited 1 Vern. 75, 77; *Kildare v. Eustace*, 1 Vern. 404; *Toller v. Carteret*, 2 Id. 404; *Cranstown v. Johnson*, 3 Ves. jun. 170; *Jackson v. Petrie*, 10 Id. 164; *Massie v. Watts*, 6 Cranch, 148; *Mitchell v. Bunch*, 2 Paige, 606; S. C., 22 Am. Dec. 669; *Keyser v. Rice*, 47 Md. 203; *Pingree v. Coffin*, 12 Gray, 304; *Carroll v. Lee*, 3 Gill & J. 504; S. C., 22 Am. Dec. 350; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462 (injunction); *Gardner v. Ogden*, 22 N. Y. 327; *Meade v. Merritt*, 2 Paige, 382; *Snook v. Snetzer*, 25 Ohio St. 516, 520; *Watkins v. Holman*, 16 Pet. 25, 57; *McDowell v. Read*, 3 La. Ann. 391. In Louisiana the power of equity to compel a conveyance of land in Texas was denied: *Musina v. Alling*, 11 Id. 568. But the case was based rather upon the ground that courts of equity in that state did not possess the full powers of the English chancery courts than upon the ground that equity did not, in general, possess such a power: See also, upon the power of equity in this respect, the note to *Penn v. Lord Baltimore*, 2 Lead. Cas. Eq., 4th Am. ed., 1823 et seq.

JURISDICTION OF PERSON MUST BE OBTAINED. This is, of course, indispensable. The basis of the power of equity to affect at all subject-matter beyond the limits of its jurisdiction is its power to act in *personam*. Therefore it must have obtained jurisdiction of the person of the party who is to be compelled to act concerning such subject-matter, either by personal service of process upon the party while he is within the jurisdiction, or by his voluntary appearance and submission to the jurisdiction: *Gardner v. Ogden*, 22 N. Y. 327; *Carroll v. Lee*, 3 Gill & J. 504; S. C., 22 Am. Dec. 350; *Keyser v. Rice*, 47 Md. 203; *Mitchell v. Bunch*, 2 Paige, 606; S. C., 22 Am. Dec. 669; *Stephenson v. Davis*, 56 Me. 75; *Worthington v. Lee*, 61 Md. 530; *Snook v. Snetzer*, 25 Ohio St. 516, 520; *Hawley v. James*, 32 Am. Dec. 623; *Davis v. Headley*, 22 N. J. Eq. 120; *Blount v. Blount*, 1 Hawks, 635; *Baldwin v. Talmadge*, 39 N. Y. Super. Ct. 400; *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *Sutphen v. Fowler*, 9 Paige, 280; *Cleveland v. Burrill*, 25 Barb. 532; *Penn v. Hayward*, 14 Ohio St. 302.

EFFECT OF DECREE.—IT HAS NO EFFECT *PER SE* UPON REAL PROPERTY BEYOND JURISDICTION. From the very nature of the property, land must be governed by the *lex loci rei sitæ*. No judgment of a court of another jurisdiction can have any effect upon the title to the property. And the power of equity in decreeing the conveyance of land is effectual only upon the person, not upon the land. The decree does not change the title to the land. It remains the same as before until the person in whom the title resides either voluntarily or perforce obeys the decree of the court and divests himself of the title by a conveyance valid under the *lex loci*. The decree of chancery, then, with respect to realty beyond its jurisdiction, can have no direct operation upon the property, and *per se* in no way affect the legal or equitable title thereto: *Carrington v. Brents*, 1 McLean, 167; *Massie v. Watts*, 6 Cranch, 148; *Hawley v. James*, 32 Am. Dec. 623; *Proctor v. Ferebee*, 1 Ired. Eq. 146. A decree of the United States circuit court directing a conveyance of lands in Ohio does not operate as a conveyance *per se*: *Shephard v. Ross County*, 7 Ohio, 271. And if the party ordered to convey had no title, none would pass, even if he obeyed the decree and executed a conveyance: *Proctor v. Ferebee*, 1 Ired. Eq. 146. The decree itself cannot transfer title, nor can the deed of a master in chancery, executed under the direction of the court: *Burnley v. Stevenson*, 24 Ohio St. 474. As equity has no power over the land itself, a demurrer will lie to a bill brought for the delivery of possession of land out of the jurisdiction, though a sale of the land might be decreed: *Roberdeau v. Rous*, 1 Atk. 543. So equity cannot decree a sale of lands in another state upon a petition of the heirs, on the ground that it would not admit of advantageous division. This would be an act *in rem*, and the court could not enforce its decree or authorize its own trustee to go into the other state and sell property: *White v. White*, 7 Gill & J. 208. A judgment of a court of another state, that a deed given for lands is void, is a judgment as to the title to lands which that court has no jurisdiction to make, nor could it decree a conveyance or delivery of possession founded on that decree: *Davis v. Headley*, 22 N. J. Eq. 120. Still a decree concerning a conveyance is not without its effect *per se*. Thus a decree directing a conveyance may be pleaded as a cause of action or defense in the courts of the state where the land is situated, and it is entitled in such a court to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud. And the parties are concluded by the decree as to the matters adjudged, though no conveyance is made: *Burnley v. Stevenson*, 24 Ohio St. 474.

CASES OF CONTRACT, FRAUD, OR TRUST GIVE EQUITY JURISDICTION TO DECREE CONVEYANCE OF FOREIGN REALTY, ETC. A suit in which a conveyance of realty without the jurisdiction, or a decree affecting property or subject-matter without the jurisdiction of the court, is sought, must itself be within the jurisdiction of the court. The decree is but the final decision of the court in determining the proper relation between the parties before it, and in administering justice between them. After the court has obtained jurisdiction of the parties in a suit of which it is rightly cognizant, it will proceed to order a conveyance of foreign land, or decree the performance of some similar act with regard to foreign subject-matter. But the matter in which equity will exercise this power must be a matter of equitable cognizance. And it is not every case that may be presented to the court that will warrant such a decree as this. Thus we have seen its decree cannot *per se* affect the land, and therefore it will not entertain a suit for the delivery of possession of land without the jurisdiction: *Roberdeau v. Rous*, 1 Atk. 543; and see *supra*. If the cause be considered as involving a naked question of title, the cause would be

local; but where the defendant is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, equity will have jurisdiction wherever the defendant may be found: *Massie v. Watts*, 6 Cranch, 148, 153, 160; or, briefly stated, equity will grant relief of this sort in cases of contract, fraud, or trust: *Pike v. Hoare*, 2 Eden, 185; *Selkrig v. Davies*, 2 Dow, 231; *Moore v. Jaeger*, 2 McArthur, 465; *Mitchell v. Bunch*, 2 Paige, 606; S. C., 22 Am. Dec. 689. The following are examples of cases where equity will not exercise this power: Equity will not extend its jurisdiction over the person of a defendant so as to affect lands in a foreign jurisdiction (create a lien upon them), when there is no privity between the parties: *Norris v. Chambres*, 29 Deav. 253. It will not direct an issue to try the validity of a will of lands in a foreign jurisdiction: *Pike v. Hoare*, 2 Eden, 185. No authority is given by the English bankrupt law to compel a bankrupt to convey his foreign realty to the assignees, and therefore this will not be decreed: *Selkrig v. Davies*, 2 Dow, 231.

Nor will such a decree be made when it cannot be enforced. Thus we have seen that it is indispensable that the court should have jurisdiction of the defendant. And the court will not decree that an executor shall sell lands in another state for payment of debts, since the decree would not be enforceable, as the executor's conveyance might not be valid in the state where the land is situated. In fact, the court had not jurisdiction of those in whom the legal title was vested. There were two executors in the state where the land was situated: *Blount v. Blount*, 1 Hawks, 365; see also *White v. White*, 7 Gill & J. 208. The court will not exercise its power to compel a person to perform a nugatory act, as compelling a bankrupt to assign to his assignees debts due him in a foreign country, when that country refuses to recognize the authority of the assignees, and the instrument which it is sought to compel him to execute is, in contemplation of law, of no effect: *Ex parte Blakes*, 1 Cox, 398. But whenever the parties, or the subject, or such portion of the subject, are within the jurisdiction, so that an effectual decree can be made and enforced so as to do justice between the parties, and the matter is one of equitable jurisdiction, the court will act: *Ward v. Arredondo*, 1 Hopk. Ch. 213; S. C., 14 Am. Dec. 543.

CONTRACT.—EQUITY WILL DECREE SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND IN FOREIGN JURISDICTION. This is a matter arising out of contract and of familiar equitable cognizance. In such a suit, when the court has obtained jurisdiction of the person of the defendant the court will decree a conveyance of the land though it be situated without the jurisdiction of the court, and will enforce its decree by acting *in personam*. One of the earliest instances of the exercise of this jurisdiction is the case of *Penn v. Lord Baltimore*, 1 Ves. sen. 444, where specific performance was decreed of articles executed in England concerning the boundaries of Maryland and Pennsylvania. And the following cases sustain this jurisdiction of equity: *Archer v. Preston*, 1 Eq. Cas. Abr. 133, c. 3, cited 1 Vern. 75; *Caldwell v. Carrington*, 9 Pet. 83; *Watts v. Waddle*, 6 Id. 389, 400; *Carrington v. Brents*, 1 McLean, 167; *Rourke v. McLaughlin*, 38 Cal. 196; *White v. White*, 7 Gill & J. 208; *Davis v. Parker*, 14 Allen, 94, 98; *Brown v. Desmond*, 100 Mass. 267; *Davis v. Headley*, 22 N. J. Eq. 120; *Baldwin v. Talmadge*, 39 N. Y. Super. Ct. 400; *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *Ward v. Arredondo*, 1 Hopk. Ch. 213; S. C., 14 Am. Dec. 543; *Sutphen v. Fowler*, 9 Paige, 280; *Cleveland v. Burrill*, 25 Barb. 532; *Penn v. Hayward*, 14 Ohio St. 302; *Burnley v. Stevenson*, 24 Id. 474; *Topp v. White*, 12 Heisk. 165; *Hughes v. Hall*, 5 Munf. 431;

Story's Conf. L., sec. 541. In *Cleveland v. Burrill*, 25 Barb. 532, this jurisdiction was carried to the extent that specific performance was enforced of a contract of sale of lands situated in another state, though the contract was made and was to have been performed there, and though plaintiff, the vendor, was a non-resident, the defendant having been duly served: See also *Myres v. De Mier*, 4 Daly, 343; *Baldwin v. Talmadge*, 39 N. Y. Super. Ct. 400. The court took jurisdiction of a bill for specific performance, though the only subjects of its jurisdiction were the defendant's agent and the deed, and enjoined the agent from sending the deed out of the state back to the owners of the land before the determination of the suit: *Ward v. Arredondo*, 1 Hopk. Ch. 213; S. C., 14 Am. Dec. 543. The defendant was decreed to pay the purchase money on condition that the plaintiff execute and tender titles to be approved by the commissioner, in *Episcopal Church v. Wiley*, 2 Hill Ch. 594. Where the defendant in a suit for specific performance is an infant, the proper decree is that he convey the legal title to the premises when he arrives at a proper age to do so, according to the laws of the state where the property is situated; and that in the mean time the vendee be permitted to receive and retain possession of the property: *Sutphen v. Fowler*, 9 Paige, 280. Where, however, only a part of the persons from whom the conveyance is sought are residents, and the court has not acquired jurisdiction of the non-residents, so that complete relief can be had, the suit will be dismissed: *Penn v. Hayward*, 14 Ohio St. 302.

CONTRACTS—MORTGAGES, ACCOUNTING, DEBTS.—Upon a bill to foreclose a mortgage, equity will take jurisdiction and decree foreclosure and a sale of the land, though situated within a foreign jurisdiction, if it has acquired jurisdiction of the person of the defendant by service of process upon him within the jurisdiction, or by his voluntary appearance and submission to the jurisdiction. Thus, in *Toller v. Carteret*, 2 Vern. 494, a bill to foreclose a mortgage upon the island of Sarke, a part of the duchy of Normandy, and under the jurisdiction of the courts of Guernsey, was sustained, the defendant having been served with process within the jurisdiction of the court; for *aquitas agit in personam*. A decree foreclosing a mortgage and ordering a sale of the mortgaged property is not invalid because a part of the property is without the jurisdiction, if the court had jurisdiction of the mortgagor and the mortgagees: *Muller v. Dova*, 94 U. S. 444. Where corporations of three states are consolidated into one, a court of equity, in foreclosing a consolidated mortgage upon the entire property, has jurisdiction to sell all the property in all the states, and separate suits are unnecessary: *Blackburn v. Selma etc. R. R. Co.*, 2 Flip. 525, 537, 538; see *McElruth v. Pittsburgh etc. R. R. Co.*, 55 Pa. St. 189.

So upon a bill for an account and settlement of a partnership, and for general relief, the court may direct a public sale within the state of land without the state, and compel the parties to convey title accordingly: *Lyman v. Lyman*, 2 Paine, 46. The complainants and defendants were joint owners of an island in the Carribean sea. It was agreed that the complainants should conduct the business of collecting and selling guano, which was found upon the island, and that the profits should be proportionally divided, and the complainants were to have a lien upon the island and the personal property used there in the business for any advances made by them. The undertaking proved unprofitable, and the complainants filed a bill against the defendants, who were resident within the jurisdiction and duly appeared, praying an accounting and a decree against the defendants for their proportion of the losses and for a sale of the island, its contents, and the personal property con-

nected with it. The court sustained the bill, holding that it was no objection to its jurisdiction that the land was situated without its jurisdiction: *Wood v. Warner*, 15 N. J. Eq. 81. Upon a creditor's bill to subject the land of a judgment debtor, the latter may be compelled to convey lands in another state for the benefit of his creditors, in such a manner as to vest in the grantee the legal title: *Bailey v. Ryder*, 10 N. Y. 363. Where a receiver of an insolvent firm sold all the debts due the firm to a purchaser, who collected part of them, and among them were debts due from non-residents, if the payment of these latter debts was refused, the court could compel the firm which was within its jurisdiction to assign all its interest therein to the purchaser from the receiver, so as to vest the same in him: *Loney v. Penniman*, 43 Md. 130. But in *Ex parte Blakes*, 1 Cox, 398, the court refused to compel a bankrupt to assign to his regularly appointed assignees debts due him in America, when that country refused to recognize the authority of the assignees in England to receive the debts, on the ground that such an assignment by the debtor was, by the law of England, idle and of no effect.

TRUSTS.—So in the enforcement of trusts, express, implied, or resulting equity, if it is necessary for the equitable adjustment of rights, the furtherance of justice, and the due execution of the trust, will decree the performance of an act affecting foreign property, such as the conveyance of realty in a foreign state or country: *Moore v. Jaeger*, 2 McArthur, 465; *Vaughan v. Barclay*, 6 Whart. 392; *Burnley v. Stevenson*, 24 Ohio St. 474; and in addition thereto, will decree an accounting of rents and profits: *Farley v. Shippen*, 1 Wythe, 254. In *Kildare v. Eustace*, 1 Vern. 404, one of the early authorities for this power of equity, a bill was sustained that prayed for relief touching a trust of lands in Ireland, the defendant being in England. The trustee of a mortgage by a railroad company of their property, real and personal, some of which is situated without the state, may be compelled to sell whatever interest of the company will pass under the terms of the mortgage: *McElrath v. Pittsburgh etc. R. R. Co.*, 55 Pa. St. 189; see also *McCurdy's Appeal*, 65 Id. 290, 296. Where a testator devised land in another state to trustees, upon trusts that were illegal and void, a resulting trust vested in the heirs, and the trustees were decreed to convey the land to the heirs: *Hawley v. James*, 7 Paige, 213; S. C., 32 Am. Dec. 623. Heirs were decreed to account for lands in another state descended to them as a trust, subject to the payment of debts, where in that state lands descended were subject to the payment of debts: *Dickinson v. Hoomes*, 8 Gratt. 353. A suit to annul trust deeds of lands in a foreign state was sustained in *McDowell v. Read*, 3 La. Ann. 391. But the jurisdiction of Louisiana courts to decree the conveyance of land in another state was denied in *Mussina v. Alling*, 11 Id. 568.

FRAUD.—So where the suit involves a fraud, and the equities of the parties demand the conveyance of land, this will be decreed from a defendant within the jurisdiction, though the property be situated without its limits, and will decree other relief though the subject-matter be without the jurisdiction. A plea to the jurisdiction of a bill praying relief from a grant of an annuity or rent-charge upon lands in Ireland, alleged to have been fraudulently obtained, was overruled in *Arglasse v. Muschamp*, 1 Vern. 75; S. C., Id. 135. One of the leading cases in this country that establish this power of equity with respect to foreign subject-matter is *Massie v. Watts*, 6 Cranch, 148. In that case suit was commenced in the United States circuit court for the district of Kentucky to compel a conveyance by the defendant of land in Ohio, on the ground that the defendant had notice at the time of his purchase of a prior equity of the complainant. The defense that the land was

without the jurisdiction of the court was overruled, and afterwards, on appeal to the supreme court, this judgment was sustained, on the ground that, as the defendant was equitably bound to convey the land, equity would decree its conveyance notwithstanding it was situated in another state.

A purchase (by a creditor) of an estate in the West Indies, by a creditor under his own execution, was, under the circumstances, held to be only a security for the debt and expenses of the proceeding and incumbrances paid by him, with interest, and subject to this a reconveyance was decreed: *Cranstown v. Johnson*, 3 Ves. jun. 170. But in *White v. Hall*, 12 Id. 323, it was held that a judicial sale had under process and judgment of court of competent jurisdiction in one of the colonies would not be interfered with under a mere general allegation of fraud, not stating the facts constituting it.

Where an agent appointed to sell lands in another state causes a conveyance to be made to himself, this conveyance will be set aside upon the application of the principal or his heirs: *Sturdevant v. Pike*, 1 Ind. 277. So equity may decree the execution or the cancellation of a deed for lands situated without the limits of the jurisdiction of the court, when the lands were obtained by fraud: *Guerrant v. Fowler*, 1 Hen. & M. 5. A vendor was enjoined from bringing any suit to enforce a contract for the sale of land without the jurisdiction, on the ground of the fraudulency of the contract: *Dale v. Roosevelt*, 5 Johns. Ch. 174. So an assignment for the benefit of creditors made by citizens of the state may be declared void for fraud, though it embraces real and personal property in other states: *D'Ivernois v. Leavitt*, 23 Barb. 63. Chancery has jurisdiction of an action for a fraudulent conspiracy formed by the defendants in another state to divest the plaintiff of his title to lands in that state, when the relief sought is damages for the wrong, and an accounting, and payment of rents and profits: *Mussina v. Belden*, 6 Abb. Pr. 165.

A motion for a writ of *ne exeat regno* was made in *Jackson v. Petrie*, 10 Ves. 164, upon allegations that defendant had fraudulently obtained a sale to himself of land in the West Indies, and that the sale was liable to be set aside, and the court had jurisdiction.

MEANS OF ENFORCEMENT OF DECREE CONCERNING FOREIGN SUBJECT-MATTER.—As we have seen, equity in decreeing any act to be done relative to subject-matter situated beyond the jurisdiction of the courts acts *in personam*, upon the conscience of the party who is ordered to act. And to enforce its decree it will make use of compulsion upon the person of the defendant: *Foster v. Vassall*, 3 Atk. 589; *Carroll v. Lee*, 3 Gill & J. 504; S. C., 22 Am. Dec. 350. It enforces its decrees by attachment and sequestration: *Shephard v. Ross County*, 7 Ohio, 271. But although the defendant's property be beyond the jurisdiction so that it cannot be sequestered or taken in execution, the court does not lose its jurisdiction in relation thereto: *Mitchell v. Bunch*, 2 Paige, 606; S. C., 22 Am. Dec. 669; but it may enforce its decree by an attachment of the person: *Burnley v. Stevenson*, 24 Ohio St. 474, 478; for contempt if he fail to obey the decree: *Archer v. Preston*, 1 Eq. Cas. Abr. 133, c. 3, cited 1 Vern. 75; *Penn v. Hayward*, 14 Ohio St. 302. And in *Davis v. Hradley*, 22 N. J. Eq. 120, it was said that the decree might be enforced by imprisonment or by the infliction of *peine fort et dure*. In *Pingree v. Coffin*, 12 Gray, 304, 305, it was said that to enforce a decree for the specific performance of a contract for the conveyance of land situate within a foreign jurisdiction, the personal property of the defendant might be sequestered; the court might retain the bill, and under the general prayer for relief mold the decree to one of damages for non-conveyance; and the decree might be a foundation for other courts to compel performance specifically.)

POWER OF COURT TO COMPEL PERSON TO BRING BEFORE COURT CHILDREN OR OTHER PERSONS—HABEAS CORPUS.—This power, if it exists, has been seldom exercised. In *United States v. Davis*, 5 Cranch C. C. 622, a *habeas corpus* was directed to the defendant, directing him to have before the circuit court of the District of Columbia three colored persons, with the cause of their detention. Davis, in his return to the writ, stated on oath that he had purchased the negroes as slaves in the city of Washington; that, as he believed, they were removed beyond the District of Columbia before the service of the writs of *habeas corpus*, and that they were then beyond his control and out of his custody. The evidence tended to show that Davis had removed the negroes because he suspected they would apply for a writ of *habeas corpus*. The court held the return to be evasive and insufficient, and that Davis was bound to produce the negroes, and Davis being present in court, and refusing to produce them, ordered that he be committed to the custody of the marshal until he should produce the negroes, or be otherwise discharged in due course of law. The court afterwards ordered that Davis be released upon the production of two of the negroes, for one of the negroes had run away and been lodged in jail in Maryland. Davis produced the two negroes on the last day of the term. The same question, whether the court can by means of *habeas corpus* compel the production of a person without the limits of its jurisdiction, afterwards arose in Michigan in the *Matter of Jackson*, 15 Mich. 417, but it was not decided, as the justices were equally divided upon the question, and therefore agreed that the proceedings should be dismissed. Justice Campbell, with whom concurred Chief Justice Martin, refused to follow Davis's case, *supra*, not considering it sound law, while Justice Cooley, who delivered an opinion in which Justice Christiancy concurred, considered it as a sufficient precedent, and forcibly substantiated his opinion. It was alleged that the respondent in this case had caused an infant, Samuel W. Jackson, to be removed from Michigan, purposing to detain him out of his guardian's custody, and since then had been instrumental in keeping him out of the state, though he himself remained within the state; and the question was, whether the court could by means of the writ of *habeas corpus* compel the respondent to bring back the child into Michigan, the respondent being within the jurisdiction. Justice Campbell, in his opinion, considered that the matter of the illegality of the imprisonment to which the writ of *habeas corpus* was directed was a matter of local jurisdiction, to be dealt with at the place of the imprisonment, which was in this case Canada. Of the case in Cranch, *supra*, he said: "The only case which has been thus far discovered in which the writ has been made a foundation for reaching persons restrained of their freedom beyond the jurisdiction is that of *United States v. Davis*, 5 Cranch C. C. 622. . . . This case is entirely bald of reasons, and the most that can be said in its favor is that the judges probably decided the matter in haste, and looked more to the demerits of the respondent than to any rules of law. . . . The facts were such as to make it very desirable to deal with the wrong-doer; and if the courts were allowed to devise remedies at their option, there could be no objection to following the precedent. But it seems difficult to maintain it upon any sound principle:" Id. 430, 431. Further on he says: "It may be worthy of consideration whether the case does not come within the jurisdiction of equity. But it would be out of place now to make any investigation on that point."

Mr. Justice Cooley's opinion, on the other hand, is of course entitled to great weight. He is too well known as a thorough lawyer and a careful judge not to entitle his opinion to the most attentive consideration. He

attacks the propositions of the necessity of the wrong involved in the imprisonment being local, and that the jurisdiction of the court depended upon the statute alone; and says: "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent; and if he fails to obey it, the means to be resorted to for the purposes of compulsion are fine and imprisonment. . . . The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as greater distance may affect it. The important question is, Where is the power of control exercised? And I am aware of no other remedy. . . . What I say on this subject is carefully restricted to the case of a citizen of our own state unlawfully held in custody elsewhere by another person, who is himself within the jurisdiction of this court. If he is here, the wrong is being done here; for the wrong is done wherever the power of control is exercised. There is no inherent difficulty in the case; and the court of chancery, in the exercise of its power to compel specific performance, frequently exerts an authority over a subject-matter in a foreign jurisdiction similar to that which is sought for here. I think the case presented by the petition is one in which we can give relief, and the decision in *United States v. Davis*, 5 Cranch C. C. 622, is in point and will warrant it. There are no conflicting decisions. The incidental remarks which have been made in some cases about the remedy applying where the imprisonment is within the state seem to me of no significance. In none of those cases was attention directed to this particular point; and I have already indicated my opinion that imprisonment within the meaning of the law may be held to be wherever the person is who imprisons. This writ is based upon no technical reasons, but its scope is as broad as its power to give redress." In *Rising v. Dodge*, 2 Duer, 42, it seems to have been taken for granted that *habeas corpus* would not lie where the person detained was without the jurisdiction, though the case cannot be considered as authority to this effect; it was there decided that no action can be maintained by a father to recover damages for the removal of his infant child, so as to prevent the production of the body of the child upon a *habeas corpus*, when it appears that the father had not an absolute right to the custody of the child, and that the child was incapable of rendering any services of value. State courts cannot infringe upon the jurisdiction of the United States courts by means of the writ of *habeas corpus*: *Tarble's Case*, 13 Wall. 397; *Ableman v. Booth*, 21 How. 506. A writ of *habeas corpus*, it was held, would run to West Point and bring before the court the person of a cadet detained there. The court had jurisdiction over territory within the state ceded to the United States unless it had been expressly surrendered: *Matter of Carleton*, 7 Cow. 471. In view of these authorities, the jurisdiction of the court to compel the production of a person out of the state by means of *habeas corpus* must be considered as unsettled.

As far as we have been able to ascertain, equity has never attempted to exercise this authority. In the opinion of Justice Campbell, in *Matter of Jackson*, 15 Mich. 417, we have seen the judge intimated that the matter might be appropriate for equitable jurisdiction. And Justice Cooley, in the same case, compared the authority of the court by *habeas corpus* to the jurisdiction of equity to decree specific performance of lands in a foreign jurisdiction. Equity, when it once obtains jurisdiction for one purpose, will retain

it for all purposes. And in a matter of equitable cognizance, if it became necessary for a child or other person confined in a foreign jurisdiction by a person within the domestic jurisdiction to be produced within the court in the furtherance of equity, no doubt the court, acting in *personam*, would compel the person who was imprisoning the required party to produce him, on pain of suffering the personal power of the court, visited by means of attachment of the person.

THE PRINCIPAL CASE IS CITED UPON POWER OF EQUITY OVER SUBJECT-MATTER without its jurisdiction, as follows: A court of chancery having jurisdiction of the person of the defendant will, by its process of injunction and attachment, compel him to do justice by the execution of such conveyances and assurances as will affect the title of the property in the jurisdiction in which it is situated: *Gardner v. Ogden*, 22 N. Y. 339. A court of equity may enforce specific performance of a contract for the sale of lands situated in another state, wherein the contract was made and was to be performed, if the defendant is duly served and subjected to jurisdiction: *Myres v. De Nier*, 4 Daly, 350; *Cleveland v. Burrill*, 25 Barb. 533, 535. Though the vendor be absent from the state, the court having jurisdiction of the subject-matter may compel him to give a deed, either in person or by a commissioner appointed by the court to act for him: *Rourke v. McLaughlin*, 38 Cal. 201. A court of equity has jurisdiction to grant an injunction at the suit of a resident plaintiff against a non-resident defendant, restraining him from performing or exhibiting a drama in a foreign state in violation of the plaintiff's rights, where the summons and injunction order are served on the defendant while he is temporarily within the state: *French v. Maguire*, 55 How. Pr. 474.

QUESTIONS OF FACT IN APPELLATE COURT.—When the issues involved in a case are questions of fact, and the findings of the referee are not without evidence to support them, they are conclusive upon the appellate court, and not subject to review: *Ostrander v. Fellows*, 39 N. Y. 350. In Wisconsin the appellate court will, in an equity case, look into the testimony to see if the facts proved will sustain the findings and judgment; and therefore the decisions of the New York court of appeals that the findings must support the judgment are not applicable there, since in New York the court of appeals does not review the facts in an equity case: *Catlin v. Henton*, 9 Wis. 494. Both the above cases cite the principal case. Upon writ of error, it will be assumed that the facts stated are true, and no inquiry will be attempted as to the weight of the evidence: *Bolles v. Beach*, 53 Am. Dec. 263, and note citing prior cases 269; *Spooner v. Dunn*, 63 Id. 414.

ACTIONS CONCERNING LAND, VENUE OF—STATUTORY PROVISIONS.—Title to land must be tried in the county where the land lies: *Beverly v. Burke*, 54 Am. Dec. 351; so of trespass *quare clausum fregit*: *Champion v. Doughty*, 35 Id. 523. The supreme court of New York has succeeded to the powers of chancery over lands in another state, and the section of the code prescribing that actions concerning lands shall be local has no application when the lands are situated without the state: *Mussina v. Belden*, 6 Abb. Pr. 174; *Gardner v. Ogden*, 22 N. Y. 339; *Baldwin v. Talmadge*, 39 N. Y. Super. Ct. 407, all citing the principal case. An action for specific performance of a contract of sale of land situate within the state is, under a statute similar to the New York statute, local, and to be commenced in the county where the land is situate: *Parker v. McAllister*, 14 Ind. 15, citing the principal case. In *Loeb v. Mathis*, 37 Id. 315, it was held that the statute requiring an action for injury to real property to be commenced in the county where the real estate is situated is a statute defining jurisdiction, not venue. The principal case was

claimed by counsel to hold such a statute not jurisdictional in its nature; but this, the court said, was a mistaken view of that case.

POWERS OF EXECUTOR UNDER POWER OF SALE OF LAND GIVEN BY WILL. Power to convey lands given by will might be executed by the executor as donee of a power in trust, and not as executor under the will, and letters testamentary would not be indispensable to the due execution of the power: *Per Brown, J., arguendo*, in *Bolton v. Brewster*, 32 Barb. 394; see *Pumpelly v. Tinkham*, 23 Id. 322. An executor to whom a power of sale is given by will to sell land and apply the proceeds to certain purposes named in the will, and not merely to apply the same to the administration of the estate, is the donee of a power in trust, and takes as such, and not as executor, and derives his right to exercise it from the will itself, and not from its admission to probate or the issuance of letters testamentary. He may therefore execute the power before probate granted or letters obtained: *Bolton v. Jacks*, 6 Robt. 228. Donee of power may act under power conferred by a will, provided he complies with conditions precedent by qualifying as executor; therefore an executor invested by terms of the will with full powers to sell cannot exercise those powers until he takes out letters testamentary: *Humbert v. Wurster*, 22 Hun, 407. The principal case is cited in the above cases. Power to sell lands vests in the executor an interest in the land, when: See *Lessee of Williams v. Veach*, 49 Am. Dec. 453, and cases cited in the note; *Doe d. Clendenning v. Lanus*, 56 Id. 518; *Ross v. Barclay*, 55 Id. 616. Discretionary power of sale given to an executor as to property in another state cannot be legally executed by an administrator *cum testamento annexo* in the latter state: *Montgomery v. Milliken*, 43 Id. 507.

DISCRETIONARY AUTHORITY GIVEN TO AGENT CANNOT BE DELEGATED BY HIM: *Lyon v. Jerome*, 37 Am. Dec. 271, note 278; *White v. Davidson*, 63 Id. 699. Trustees of mortgages given to secure bonds are clothed with the duty of enforcing the mortgages against the property covered thereby in case default is made in the payment of the bonds, and of making such a disposition thereof as will best promote the interests of the bondholders. This duty is a personal one, and the trustee cannot divest himself of it by delegating its performance to any other person: *Merrill v. Farmers' Loan and Trust Co.*, 24 Hun, 300. The rule that an agent, public or private, cannot delegate his authority in cases requiring the exercise of judgment or discretion does not apply to the indorsement of drafts by a deputy in the state treasurer's office: *People v. Bank of North America*, 75 N. Y. 556. Both the above cases cite the principal case.

RATIFICATION OF ACTS OF UNAUTHORIZED AGENT BINDS PRINCIPAL: See *White v. Davidson*, 63 Am. Dec. 699, and cases cited in the note 704. It was held in *Dodge v. Hopkins*, 14 Wis. 638, that where a contract for the sale of land is not binding upon the owner of the land because made by a person who assumed to act as his agent without any authority, it is not binding upon the other party; and no subsequent act of the owner in ratification of the contract could make it obligatory upon the vendee without his assent. The court comments upon the statement in the principal case that "a subsequent ratification is equally effectual as an original authority," and remarks that though true enough when restricted to the facts of the principal case and similar cases, it is too broad when applied to every case, and lays down the distinction that the principle is true where the subsequent act of ratification is made the basis of a demand against the party who ratifies, and it is not true in case of an executory contract when the ratification is put forth as the foundation of a right in favor of the ratifying party. And in the latter case,

in order that the contract may become binding, the other party must consent, or, in other words, there must be a mutual ratification.

AGENT'S AUTHORITY TO CONTRACT FOR SALE OF LANDS MAY BE BY PAROL: *Worrall v. Munn*, 55 Am. Dec. 330, and note 343, 344, citing other cases; see *Curtis v. Blair*, 59 Id. 257; *Ford v. Williams*, ante, and note. The statute of frauds does not require that the authority of the agent contracting for the sale of lands should be in writing. It may be established by parol, and it will be inferred where the principal adopts the act of the agent. Thus an authority to sell, given to one whose occupation is that of a real estate broker, authorizes the broker to sign the contract and bind his principal: *Pringle v. Spaulding*, 53 Barb. 21, citing the principal case. So of the ratification of the agent's contract. Thus where the executor contracts under an invalid order of court to sell land of the decedent, and the heirs at law orally sanctioned the contract, and by their acts and conduct induced the plaintiff to purchase and expend money under the contract, it was held, in a suit by the plaintiff to compel the heirs at law to execute a conveyance of such land, that they were estopped to deny the agency of the executor, and the plaintiff obtained judgment: *Favill v. Roberts*, 3 Lans. 25, citing the principal case. Where, by the terms of a lease, it cannot be assigned without the written consent of the lessors, and it is assigned by virtue of the written consent of a person professing to act as their agent, a suit by the lessors to enforce the contract embraced in the assignment is, between them and the assignees, a ratification of the acts of the agent, and sufficient evidence of his authority: *Dodge v. Lambert*, 2 Bosw. 578, citing the principal case.

AGREEMENT FOR SALE OF LANDS, SIGNED BY VENDEE ONLY, and not by the vendor, is void by the statute of frauds: *De Beeraki v. Paige*, 47 Barb. 175, citing the principal case; see note to *Worrall v. Munn*, 55 Am. Dec. 344. A written instrument, subscribed by the owner of land, authorizing a real estate broker to sell it upon certain terms therein specifically stated, and an agreement to purchase the property upon those terms subscribed by a purchaser, subsequently written across the face of the paper while unrevoked in the hands of the broker, do not, taken either separately or together, form a contract for the sale of the land binding upon the owner under the statute of frauds, nor does his subsequent parol assent to the terms of sale give validity to the transaction: *Haydock v. Stow*, 40 N. Y. 371, citing the principal case.

MEMORANDUM OF AGREEMENT FOR SALE OF LANDS is not sufficient unless it discloses the terms of the contract and the parties thereto: *Sherburne v. Shaw*, 8 Am. Dec. 47; see *Cosack v. Descoudres*, 10 Id. 681. If it can be made certain by reference to something else, it will be sufficient: *Abel v. Radcliff*, 7 Id. 377. It need not be contemporaneous with the contract nor contained in one instrument: *Idle v. Stanton*, 40 Id. 698.

SCOTT v. ONDERDONK.

[14 NEW YORK (4 KERNAN), 9.]

BILL TO REMOVE CLOUD ON TITLE WILL NOT LIE WHEN INSTRUMENT COMPLAINED OF AS CLOUD IS VOID on its face, or is void for omission of preliminary proceedings which any one claiming under it would be required to prove.

BILL TO AVOID CONVEYANCE AS CLOUD LIES WHERE STATUTE DECLARES IT PRESUMPTIVE EVIDENCE of the regularity of preliminary proceedings, if

the proper preliminary proceedings were not in fact had, as in case of a sale for a municipal assessment for a public improvement.

BILL LIES TO ENJOIN CONVEYANCE WHICH WOULD BE CLOUD ON TITLE after an invalid sale for a municipal assessment, and the issuance of a certificate of sale.

APPEAL to revise a judgment of the city court of Brooklyn overruling a demurrer to the complaint. The facts appear in the opinion.

John E. Burrell, for the appellant.

P. V. R. Stanton, for the respondent.

By Court, DENIO, C. J. The substance of the complaint is, that without having laid an assessment affecting the plaintiff's lots the corporation proceeded to sell them as though they had been legally assessed; that the defendant Onderdonk became the purchaser at the sale, receiving a certificate of the purchase, and is seeking to consummate the transaction by obtaining a conveyance of the property from the corporation for a long term of years. Though it is improbable that the sale was made without the pretense of a valid assessment, the defendants have chosen to put themselves upon the naked case that there was no assessment; and the question to be determined is whether, conceding such a state of things to exist, the plaintiff, before he has been actually disturbed, is entitled to maintain this action, and to have a judgment arresting the proceeding and setting aside what has been done. Ordinarily, a party must wait until his rights have been actually interfered with before he can implead another from whom he anticipates an injury. But there are several exceptions to this rule; and when the jurisdiction at law and equity was administered in different courts and by different forms of proceeding, it was a common case for a party to appeal to a court of equity for relief against an apprehended injury to be effected by his adversary by some act *in pais*, or by some legal proceeding which he could not defend himself against upon the principles of the common law. This class of cases has been narrowed by the law abolishing the distinction between the two jurisdictions; and now, as a general rule, if the party claiming relief has a good defense, whether it be of a legal or equitable nature, and if he can only be divested of his rights by some suit in court instituted by his adversary, he must wait until he is thus challenged, when he will be in time to bring forward his defense. That there is a certain degree of inconvenience in this rule, in many cases which may be supposed, is admitted;

but the evil would be much greater if every person who could show that what he claimed to be his rights was questioned by some other person could call such person into court and compel him to disclaim or to litigate the matter in advance. Courts have commonly occupation enough in determining controversies which have become practical, without spending time in hearing discussions respecting such as are merely speculative or potential. The most prominent of the inconveniences referred to have been remedied by legislation or by the settled practice of the courts. Thus, a party claiming to be the owner of lands may, after a certain length of possession on his part, compel the determination of the claim of any other person to the title of such land: 2 R. S. 312; Laws 1848, c. 50; Code, sec. 449. So of the cases to which the remedy by bill of interpleader formerly applied.

Besides these cases, there is a principle of equity which remains in force, notwithstanding the confusion of remedies, by which a person may in certain cases institute a suit to remove a claim which is a cloud upon the title to his property: *Hamilton v. Cummings*, 1 Johns. Ch. 517; Story's Eq., secs. 700 et seq. If, however, the claim is based upon a written instrument which is void upon its face, or which does not in its terms apply to the property it is claimed to affect, there seems to be no reason for entertaining a litigation respecting it before it is attempted to be enforced, for the party apprehending the danger has his defense always at hand. In such a case, this court has determined that no action at the suit of the party apprehending injury will lie: *Cox v. Clift*, 2 N. Y. 118. The same reason applies to cases where the claim requires the existence of a series of facts or the performance of a succession of legal acts, and there is a defect as to one or more of the links. The party must, in general, wait until the pretended title is asserted. This principle is also very well settled by authority: *Van Doren v. Mayor etc. of New York*, 9 Paige, 388; *Mayor etc. of Brooklyn v. Merserole*, 26 Wend. 132. In both these classes of cases the party whose estate is questioned may naturally wish to have the matter speedily determined, as he may in the mean time suffer inconveniences, and even actual damage, on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant its interference. I am not able, therefore, to concur in the views of the city court of Brooklyn, contained in the opinion which has been laid before

us, to the effect that in every case where an instrument in the hands of another person is calculated to induce the belief that the title of the plaintiff is invalid, an action will lie to set it aside. In this case, therefore, if Onderdonk, the purchaser at the corporation sale, in asserting his title after he had perfected his purchase, would be obliged to prove the laying of the assessment, as well as the other proceedings anterior to the conveyance, I should be of opinion that the complainant had not established a case for relief. Neither the proceedings of the corporation nor the conveyance to Onderdonk, when obtained, would constitute such a cloud upon the plaintiff's title as is contemplated by the rule. It would be impossible for Onderdonk to recover the possession of the lots, for he could not establish the existence of the assessment, and the plaintiff might rest in perfect safety. But the forty-fifth section of the charter of the city of Brooklyn provides that the conveyance under such a sale as was made in this case, which is to be executed under the corporate seal, shall briefly set forth the proceedings had for the sale of the premises, and that by force thereof the purchaser shall be entitled to the possession, and to the same remedy to recover such possession as is provided by law for the removal of tenants who hold over after the expiration of their terms, and that such "conveyance shall, in any such proceeding, be deemed *prima facie* evidence of the facts therein recited and set forth:" Laws 1834, p. 108. A conveyance properly prepared under this provision would recite the ordinance or resolution of the common council imposing the assessment, and such recital would be presumptive evidence of the existence of that ordinance. It is true, the owner of the land would be at liberty to disprove it, if he could obtain the evidence; but the statute contemplates that the purchaser shall be furnished with a document bearing on its face *prima facie* evidence of a title in him, and can only be impeached by proof *aliunde* of the falsity of its recital. The authorities to which I have referred admit that in such cases the party is not compelled to take the hazard of the loss of his evidence, but may, while it is attainable, call the party holding such a document into court and have the matter determined at once, so that the cloud upon his title may be dispelled. If the plaintiff would be entitled to set aside a conveyance, upon the facts stated in the complaint, if one had been obtained, then, inasmuch as the purchaser is seeking to obtain such a conveyance, and the corporation of Brooklyn is ready to execute one, as is apparent from the terms of the certificate of sale, it is right

that they should be enjoined from proceeding further towards that object. For the single reason, therefore, that the statute gives to the conveyance the effect which has been mentioned, I am of opinion that the city court was right in overruling the demurrer and giving the plaintiff the relief which he sought.

Judgment affirmed

BILLS TO REMOVE CLOUDS ON TITLE: See *Lyon v. Hunt*, 46 Am. Dec. 216; *Banks v. Evans*, 48 Id. 734; *Downing v. Wherrin*, 49 Id. 139. The principal case is frequently cited as an authority upon this subject. It has been often held that where a certificate of sale, or a deed of property illegally sold to pay an assessment or tax, is valid on its face, requiring extrinsic evidence to show its invalidity, or is made by statute presumptive evidence of the regularity and validity of the prior proceedings, so that the mere presentation of such certificate or deed would make out a *prima facie* title, a bill in equity will lie to remove it as a cloud on the title: *Lewis v. Buffalo*, 29 How. Pr. 339, 340; *Mann v. Utica*, 44 Id. 338; *Beach v. Hayes*, 58 Id. 21; *Marsh v. Brooklyn*, 2 Hun, 143; S. C., 4 Thomp. & C. 415; *Astor v. Mayor etc. of New York*, 5 Jones & S. 581; *Hatch v. Buffalo*, 38 N. Y. 277; *Allen v. Buffalo*, 39 Id. 390; *Crooke v. Andrews*, 40 Id. 549; *Hassan v. Rochester*, 67 Id. 536; *Berlew v. Quarrier*, 16 W. Va. 163; *Dean v. Madison*, 9 Wis. 406, all approving and following the principal case. Thus, where an assessment was illegally made to one not the owner or occupant of property, but the statute made the certificate of sale a *prima facie* lien thereon, it was decided that an action lay to remove or cancel it as a cloud on the title: *Crooke v. Andrews*, 40 N. Y. 549. So, where an assessment for grading a street was invalid for want of a certificate that an application had been made therefor by a majority of the adjacent property owners: *Hatch v. Buffalo*, 38 Id. 277; *Allen v. Buffalo*, 39 Id. 390. The former of the two cases last cited was said by the court to stand *quatuor pedibus* with the principal case. But a suit or action will not lie to cancel an invalid assessment or tax which is not *prima facie* a lien upon the plaintiff's property: *Clark v. Davenport*, 95 Id. 484; *Sanders v. Yonkers*, 63 Id. 492; *Townsend v. Mayor*, 77 Id. 546; or to remove or cancel a tax certificate or tax deed which is void on its face or is not made *prima facie* evidence of the regularity of the proceedings: *Overing v. Foote*, 43 N. Y. 293; *Head v. James*, 13 Wis. 643. If the defect invalidating the assessment, tax, certificate, or deed appears on the face of proceedings which the purchaser thereunder must himself produce to prove his title, there is no cloud: *Overing v. Foote*, 43 N. Y. 293; *Guest v. Brooklyn*, 69 Id. 514, 515. So, where the statute under which the assessment or tax is levied is unconstitutional, as that is a defect of which the purchaser must take notice at his peril: *Townsend v. Mayor*, 77 Id. 546.

In *Marsh v. Brooklyn*, 59 N. Y. 284, 285, it was held, reversing S. C., 2 Hun, 142, 4 Thomp. & C. 413, that under the charter of Brooklyn of 1854, making a deed on a sale to pay a municipal assessment *prima facie* evidence merely of the validity of the proceedings "had for the sale," and not of the validity of the assessment or other proceedings anterior to those relating to the sale, a deed for an assessment to one not the owner would constitute no cloud upon the title, and no action would lie to remove it, since the purchaser must show a valid assessment to make out his title; and the principal case was distinguished as having been decided under the charter of 1834, under which a deed made upon such a sale entitled the purchaser to possession. A

similar decision was made, and the same distinction drawn, in *Guest v. Brooklyn*, 69 N. Y. 513-515.

The doctrine of the principal case has also been frequently applied to other than tax cases. Generally, when a conveyance of any kind, though invalid in fact, is valid on the face of it, and will require extrinsic proof to overcome it, a bill will lie to cancel or remove it as a cloud on the title of the true owner. Thus where, owing to the presumption of the regularity of official acts, a lease made by public officers is *prima facie* valid, but in fact void, because certain statutory prerequisites have not been complied with, the owner of property whose title is clouded thereby may maintain an action to have it adjudged void: *Mayor v. North Shore etc. Co.*, 9 Hun, 622. So where a forged deed was put on record because of a false certificate of acknowledgment thereto by an authorized public officer, it was held to be a cloud which equity would remove: *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 483. So it has been held that where judgments are apparent liens on property, but have been in fact paid, a subsequent judgment creditor may maintain an action to have them canceled: *Shaw v. Dwight*, 27 Id. 247. So where a husband had the apparent title to property which was really his wife's, and it was sold on execution against him, and a certificate of sale issued, it was decided that a suit or action was maintainable by the wife to remove it: *Tisdale v. Jones*, 38 Barb. 527. And where a mother purchased certain realty, and directed the deed made to herself, with a proviso that her son should have the property upon her death upon his paying a certain annual sum for her maintenance, but the deed was made by mistake to her in trust for her son, and was afterwards returned and destroyed, and a deed made to her in fee, and the land was subsequently sold on execution against the son, and a certificate of sale issued, it was held that a bill would lie to remove it as a cloud: *Fond v. Sage*, 48 N. Y. 179. So where a deed was executed by a *feme covert* in blank, with parol authority to her husband so to fill it as to release her dower and homestead right, and it was afterwards so filled up, to which she assented, a bill by her to remove it as a cloud on her title was held maintainable: *Burns v. Lynde*, 6 Allen, 312. And where a widow was seeking to have dower admeasured in certain land sold by the executors of her husband, of which she had enjoyed the proceeds, in accordance with a direction in the will, jurisdiction to remove or prevent the cloud was maintained: *Wood v. Seely*, 32 N. Y. 113, 117. And the principal case was cited to the general proposition that where a plaintiff claims that he has a valid legal defense against an apparent legal title, but the evidence may be lost by lapse of time, or where proceedings affecting the title to his realty are *prima facie* valid, but void in reality, equity has jurisdiction to remove the cloud.

On the other hand, unless the conveyance or proceeding which is alleged to cloud the plaintiff's title is valid on its face, requiring extrinsic evidence to show its invalidity, there is no jurisdiction to remove the pretended cloud, but the owner will be left to defend himself at law when the spurious title is asserted: *Ewing v. St. Louis*, 5 Wall. 419. Thus a judgment void on its face is not a cloud on title which equity will remove: *Kendall v. Hodgins*, 7 Abb. Pr. 321; S. C., 1 Bosw. 670. So of a trust deed suspending the power of alienation and the absolute ownership beyond the period allowed by law, and therefore void on its face: *Levy v. Hart*, 54 Barb. 258. So of an executory contract of sale made by one assuming to act as the plaintiff's agent, but without authority, for the defendant would be compelled to prove the authority in order to enforce the contract: *Washburn v. Burnham*, 63 N. Y. 134. Equity will interfere, in such cases, only where the law does not afford

adequate protection: *Albany etc. R. R. Co. v. Brounell*, 24 Id. 348. The cloud sought to be removed must exist without right to give jurisdiction to remove it, and generally, unless an action for slander of title would lie, the injury is too speculative to warrant the interference of a court of equity, and the party must wait till the adverse title is asserted: *Ryerson v. Willis*, 81 Id. 281. Equity will not interfere to prevent speculative injuries, and a bill to remove a cloud on title must therefore show the nature of the defendant's claim: *Peck v. Brown*, 26 How. Pr. 369; S. C., 2 Robt. 128. In all the foregoing cases the principal case is cited, and its doctrine approved.

EQUITY WILL PREVENT CLOUD ON TITLE, as well as remove one; and a suit or action may therefore be maintained to enjoin a sale for an illegal tax or an assessment, whenever the deed would be presumptive evidence of title; *Beach v. Hayes*, 58 How. Pr. 21; see also *Guy v. Hermance*, 63 Am. Dec. 85. So a bill will lie to restrain the negotiation of municipal bonds whereby the title to the plaintiff's land would be clouded, if the bonds and proceedings, though in fact invalid, would create a *prima facie* liability: *Springport v. Teutonia Savings Bank*, 75 N. Y. 404, both citing the principal case. Other cases in which the preventive jurisdiction has been exercised are mentioned in the preceding section of this note. But in *Clark v. Davenport*, 95 Id. 485, it was held that an injunction would not lie to prevent the state controller from executing a deed after an illegal tax sale where he had issued a certificate of sale, there being no allegation of any demand on him to cancel the sale, and no averment that he had refused to cancel it, or was threatening a conveyance, it appearing that he was prohibited by law from executing the deed if the sale was illegal; and the principal case was distinguished as going upon the ground that the city was ready to create a cloud upon the plaintiff's title, and was about to do so, as was apparent from the certificate. So in *Sanders v. Yonkers*, 63 Id. 492, it was held that a bill would not lie to vacate an illegal municipal assessment, and to restrain the execution of a lease thereunder, in accordance with the statute, although it was alleged that the lease would be presumptive evidence of title, but there was nothing in the charter making the assessment, before a lease, *prima facie* evidence of its own regularity, and the complaint containing no allegation that the assessment was regular on its face, or that there was any record making it *prima facie* evidence, or that any lease was threatened.

Suits to remove clouds from titles must not be confounded with actions to determine adverse claims authorized by section 738 of the California code of civil procedure. That section is as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

A proceeding under this section is equitable in its nature: *Brandt v. Wheaton*, 52 Cal. 430. The plaintiff need not have an estate in fee: *Pierce v. Feller*, 53 Id. 18. It is not necessary that the adverse title be shown to be a cloud, or that its character be stated in the complaint. It is sufficient that the plaintiff has some estate or interest in the property, and that defendant claims some estate or interest adverse to him: *Curtis v. Sutter*, 15 Id. 262; *San Francisco v. Beideman*, 17 Id. 461; *Stoddard v. Burge*, 53 Id. 399. A complaint is undoubtedly sufficient under this statute which avers that plaintiff is the owner of certain real property (describing it), and that defendant claims an estate or interest therein adverse to plaintiff, which claim is without right, and that defendant has estate, right, title, or interest in such property: *Rough v. Simmons*, 4 West Coast Rep. 831.

BRAMHALL v. FERRIS.

[14 NEW YORK (4 KEENEAN), 41.]

CONDITION IN DEVISE OF LIFE INTEREST, THAT IT SHALL CEASE ON JUDGMENT AGAINST DEVISEE being recovered in a creditor's suit instituted to reach it, and that the executors shall thereafter apply the income to the support of the devisee's family, is not repugnant to the estate devised nor contrary to public policy, and is valid, and a creditor cannot reach such interest unless the income exceeds what is necessary for support.

CREDITOR'S BILL LIES TO REACH DEBTOR'S INTEREST IN TRUST FUND after the return of an execution unsatisfied at law; but not, it seems, under the New York revised statutes, in case of a trust fund created by or proceeding from any other person than the debtor. *Per* Comstock, J.

DIRECTION IN WILL TO CONVERT REALTY INTO MONEY operates as an equitable conversion, and the realty is thereafter to be deemed personality in equity.

APPEAL from a judgment for defendants in a creditor's suit. The father of Myron H. Ferris, dying, devised to his son an estate for life; to which he added a codicil declaring his will to be, that in the event of a judgment being recovered in a creditor's suit against the son, instituted for the purpose of obtaining the fund devised, the son's interest in it should cease, and thereafter the executors should apply the income to the support of the family in such way as they in their discretion should adopt. The present suit was brought by creditors of the son for the purpose of reaching the fund; and the question arose whether the condition was valid and placed the fund beyond reach of the decree. The judge who tried the cause, and the full court, sustained the clause, and the creditors appealed.

H. A. Dowe, for the appellants.

Stephen B. Curling, for the respondents.

By Court, COMSTOCK, J. If we assume, as the appellants contend, that the trust which the executors hold under the will in respect to the interest of Myron H. Ferris is technical and passive merely, the conclusion does not follow that the plaintiffs are entitled to the relief they claim. By the express provisions of the will, reading the codicil as a part of it, his interest is to terminate on the event of a decree or judgment pronounced against him in a creditors' suit instituted for the purpose of obtaining the fund; and in that event the executors are directed to apply the income to the support of his family, by paying the same to his wife, or in any other mode which they in their discretion may adopt. I know of nothing in the

rules of law to prevent these provisions from taking effect according to the intention of the testator. It may and should be conceded that if the bequest to Myron H. Ferris had been given to him absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would be clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that reason, as well as upon the policy of the law: *Blackstone Bank v. Davis*, 21 Pick. 42; *Hallett v. Thompson*, 5 Paige, 583; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429. This doctrine, however, and the cases on which it rests, do not deprive a testator of the power to declare effectually that the bequest shall cease on the happening of an event which would subject it to the claims of creditors, and then to give it a different direction. "There is," said Lord Eldon, in *Brandon v. Robinson*, *supra*, "an obvious distinction between a disposition to a man until he becomes a bankrupt, and then over, and an attempt to give him property and to prevent his creditors from obtaining any interest in it, although it is his." See also *Shee v. Hale*, 13 Id. 404; *Lewes v. Lewes*, 6 Sim. 304; and *Graves v. Dolphin*, *supra*. This distinction is one of substance, and we think the principle on which it depends will sustain the will of the testator in the present case. If a testator may provide that his bounty bestowed upon one person shall cease and go to another on the occurrence of bankruptcy, I can see no reason why he may not do so in the event of an execution returned unsatisfied, followed by a creditors' suit and judgment therein.

The decision of the court below is right in another aspect. Prior to the revised statutes, it was an open question whether, after execution at law returned unsatisfied, a court of equity had jurisdiction, in the absence of special circumstances of fraud and trust, to entertain a creditors' suit for the discovery and appropriation of the debtor's interest in stocks, choses in action, legacies, and property which could not be reached by the process of courts of law. The case of *Donovan v. Finn*, 1 Hopk. 59, is a direct adjudication that the court of chancery possessed no such power. In the case of *Hadden v. Spader*, 20 Johns. 554, the question was not necessarily involved, but the contrary doctrine was distinctly asserted; see also *Pettit v. Candler*, 3 Wend. 621. The revised statutes, 2 R. S. 173, sec. 38, have settled

the question in favor of the jurisdiction in general, but against it in the excepted case, where a "trust has been created by, or the fund so held in trust has proceeded from, some other person than the debtor himself."

Here the fund in question was created by and proceeded from the testator. It was also a trust fund. Active duties in respect to it were imposed upon the executors and trustees, such as clearly required in them the presence of the legal estate. They were directed to sell both the personal and real estate, and invest the proceeds; the time of sale only, in respect to the real estate, being left in their discretion. Myron H. Ferris was to have only the "income and interest" of one third of the fund during his life, the principal being given over, on his death, to those designated in the will as his "heirs at law." This purpose alone of the testator would require the intervention of a trustee in order to secure the principal to those for whose ultimate benefit it was designed. The trust was clearly active in all its aspects; and without determining the question whether it falls within the enumeration of valid trusts in real estate, it is good as a trust in personal property. It was the clear intention of the testator that the whole of his estate, after paying the debts and the particular legacies, should be converted by sale and investment into a pecuniary fund, to be held by the executors and trustees for the purposes indicated; and upon the principle of equitable conversion, the real estate is therefore to be deemed personalty from the time of his death: *Bogert v. Hertell*, 4 Hill, 492; *Stagg v. Jackson*, 1 N. Y. 206.

I have no hesitation, therefore, in saying that the fund which the plaintiffs are endeavoring to reach is held in trust, and comes within the exception of the statute before referred to. It is consequently exempt from the claims of the creditors of Myron H. Ferris, unless the provision is larger than necessary for the support of himself and family, that being the declared object of the trust so far as he is concerned. The exception on which this exemption rests was doubtless not intended to exonerate a surplus of the fund, over and above what is required for the support of the beneficiary, and the education and support of those for whom he is bound to provide. Such is the construction which the statute has generally received in analogy to the fifty-seventh section in the article concerning "uses and trusts" in real estate, which expressly subjects the surplus beyond the sum necessary for support and education to the claims of creditors: 1 R. S. 729, sec. 57; *Clute v. Bool*, 8 Paige, 83; *Stewart*

v. *McMartin*, 5 Barb. 438. But in this case there is no averment in the complaint, nor was there any proof or suggestion on the trial that the provision made for Ferris, the judgment debtor, was any larger than the objects of the trusts strictly required.

The judgment should be affirmed.

MITCHELL, J. The will, by words of conveyance, devises to the executors all the real estate of the testator for the use of the parties beneficially interested, and constitutes the executors trustees of his personal estate for their use in order more fully to carry out his intentions. This is a devise of the real and personal estate to the trustees in trust to sell the same for the benefit of the legatees, and was a valid, express trust. It is immaterial whether the trust was to receive the rents and pay them over to those interested, although this probably was necessary to carry out the intention of the testator. There was a positive direction to convert the lands into money; that makes the whole estate in effect personal from the death of the testator, and when once converted into personal estate, it was to remain in the hands of the executors; they were to invest the proceeds of sale on bond and mortgage on real estate, and keep it so invested. They were therefore the parties to receive the income and to pay it out; they would not be justified in passing into the custody of Myron or of his sister any aliquot part of the capital of the estate, for that would be to put the capital at risk, and Myron and his sister had each at most a life interest in the capital; and the reversion was to go to others. The executors, therefore, must retain the legal title to the securities in their own names, and hold them as trustees, and as trustees receive the income and pay it out as it shall accrue. Such was the effect of the will; then came the codicil, which, as the expression of the last wish of the testator, must control the former instrument. That declares it to be his will, in case creditors' bills be filed against Myron, and judgments be obtained against him thereon, that from that period the estate or income of Myron shall cease; and the testator thereupon directs his executors thenceforth to expend the interest or income for the support of the family of Myron by paying it to his wife, or in any other practicable way.

By the will the beneficial interest in a certain share was in Myron during his life, and might perhaps have been reached in part by his creditors. The testator then alters that interest so that on a certain event it should cease, and the income should thenceforth pass to others. As the will and codicil form but

one instrument, the estate which the will might have given but for the codicil never existed. The only estate or interest which Myron ever had was that which was created by the joint effect of the two instruments; that was a right to have the income of a certain share paid over to him until a judgment creditor's bill should be filed against him and a decree had thereon, and then that right was to cease and to pass in favor of his family. The father, when he made the will and codicil, owned the whole estate; he had the absolute power over it. He could carve out of it such interests as he pleased if he violated no rule of law in doing so; he could give one third to Myron so long as he lived in this state, or so long as he lived out of it, or until a third person should return from Rome or go to it, or on any other similar arbitrary contingency, according to his will or caprice. He was under no obligation, legal or moral, to give his property so that the creditors of Myron could take it from him or his family. His moral duty and his duty to the state were greater to save Myron and his family from want or from being a burden on the public than to devote his property to pay his son's creditors. There is therefore no public policy which should frustrate the testator's intention.

The testator has not, as supposed by the counsel for the plaintiff, given to his son a certain estate, and then attempted, while the estate continued, to take from it one of the incidents which the law binds inflexibly to it; but he gives him a certain right in the property, which is to continue for a limited time until an uncertain event shall occur, and then, when that event occurs, is to cease entirely. While the son holds it, he holds it with all the incidents which the law attaches to it. When the event on which it is to cease occurs, the son has no longer any right or interest in it, and with the loss of his right, all right of his creditors also falls to the ground. If the creditors could find any previously arising income which the son had not called for, and could call for, undisposed of and in the hands of the executors, their rights to that would remain unimpaired; but when his right ceased, so also did theirs.

In *Shee v. Hale*, 13 Ves. 404, the testator bequeathed his residuary estate to trustees to pay to his son an annuity during his natural life, or until he should contract to part with the annuity, or some part of it, or to charge it by anticipation, or should empower any person to receive any part thereof except the next quarterly payment after such power; and declared that if his son should sign any writing to do any of those things, the annuity

should cease to be payable to him, and should sink into the residue. The son took the benefit of an insolvent law, and inserted the annuity in the schedule of his property. The assignees claimed the annuity, but their bill was dismissed. The only doubt that seemed to be the foundation for the claim was whether the son had done such an act as the will provided against; the master of the rolls held that he had.

In *Lewes v. Lewes*, 6 Sim. 304, the testator had devised lands to trustees in trust to receive the rents and pay three hundred pounds yearly for the maintenance of his son's family, and the residue for the use of his son, but so that he should have no power to charge or alienate it, and that it should not be subject to his debts, or be taken for the use of his creditors. These words may have been inoperative if they had stood alone; but the testator added, that if the son should at any time frustrate the trust of the will, or interfere therewith, or with the receipt of the rents, then the said residue should not be paid to his son, but should be accumulated. The son conveyed the property to trustees for his creditors, and it was held that in doing so he had attempted to frustrate the trust of the will, and so had brought about the contingency on which his interest in the residue was to cease. The trustees were directed to hold the residue to be accumulated under the will. In *Cooper v. Wyatt*, 5 Madd. 482, the testator devised to trustees certain estates, first to furnish a maintenance for the family of his nephew, Samuel Herbert, and to give the residue to him, but not to his assigns, and declared his will to be, that if his nephew should by any means sell, dispose of, or incumber the right he might have for life under the will, then his said right should cease and be applied for the benefit of the children of the nephew, in such manner as the trustees should think proper. Samuel Herbert became bankrupt, and his estate was assigned to assignees. It was contended, not that the testator might not have caused the estate to cease by bankruptcy, but that bankruptcy was a proceeding *in invitum*, and so not the act of the nephew, and that the will only provided against voluntary acts of the nephew. The rule is laid down plainly by the vice-chancellor: "The true inquiry in this case is whether, by the expressions used in this will, it can be collected to have been the intention of the testator that the estate should determine as to the nephew in the event of his bankruptcy." The court held it was so; that it was to cease "when-ever it could no longer be the subject of his immediate personal enjoyment." The same principle was recognized in *Graves v.*

Dolphin, 1 Sim. 66, and it was there said that "the testator might, if he had thought fit, have made the annuity determinable by the bankruptcy of his son;" instead of that, he gave estates to trustees in trust to pay an annuity to his son for life, and then declared it to be his intention that this annuity was for the personal maintenance of his son, and should not be liable for his debts, but should be paid to him as it became due. It failed to contain any direction giving it over to another on the bankruptcy of his son; it therefore continued in that event to be his, and passed to his assignees. The same distinction was stated and applied in *Brandon v. Robinson*, 18 Ves. 429. Lord Chancellor Eldon said: "There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate. If a condition is so expressed as to amount to a limitation, neither the man nor his assignees can have it beyond the period limited."

Thus the rule is made not to depend on the question whether the act causing the termination of the estate comes from the tenant for life or from his creditors, but on its being made (whatever it may be) a cause for the transfer of the estate to another. In *Hallett v. Thompson*, 5 Paige, 583, there was no bequest over on any contingency. In *De Graw v. Clason*, 11 Id. 136, there was what the chancellor considered an absolute estate in the legatee, alienable by her although held in trust for her, and there were no words showing that the bequest was for the personal support of the legatee, and there was no bequest over.

The judgment of the supreme court should be affirmed.

Judgment affirmed.

CONDITION IN DEVISE THAT PROPERTY SHALL NOT BE SUBJECT TO ALIENATION OR LIABLE FOR DEBTS of the devisees, validity of: See *Blackstone Bank v. Davis*, 32 Am. Dec. 241, and note; *Mebane v. Mebane*, 44 Id. 102. See also the note to *De Peyster v. Michael*, 57 Id. 438, where the subject of restraints on alienation is discussed at length. The principal case is cited in *Sparhawk v. Cloon*, 125 Mass. 266, to the point that at law property cannot be granted or devised so that the grantee or devisee can hold it inalienably, and that the same rule exists in chancery to the extent of holding that where the income of a trust estate is given to one, not a *feme covert*, for life, the equitable life estate is alienable and liable in equity for the debts of the *cestui que trust*, and that this quality is so inseparable from the estate that no express provision which is not a limitation or *cesser* of the estate will protect it from liability. In *Roosevelt v. Roosevelt*, 6 Hun, 40, 41, the case is also cited and commented on as an authority upon the point that "no class of estates has been more restrained by future conditions and conditional limitations than

trusts, and yet they have uniformly been sustained and executed where no positive provision of law has been contravened by means of them."

EQUITABLE INTERESTS, LIABILITY OF, FOR PAYMENT OF DEBTS, and how reached: See *Rice* ads. *Burnett*, 42 Am. Dec. 336; *McGough v. Insurance Bank*, 46 Id. 382; *Dargan v. Waring*, Id. 234; *Thurmond v. Reese*, Id. 440; *Withers v. Carter*, 50 Id. 78; *Heath v. Bishop*, 55 Id. 654; *Lang v. Brown*, 56 Id. 244, and notes. The case of *Heath v. Bishop*, *supra*, was the principal case, a case of a creditor seeking to subject property in the hands of a trustee to the payment of a debt of the *cestui que trust*. To the point that a creditor's bill will generally lie to reach the surplus income of a fund in a trustee's hands, the income of which is to be devoted to the maintenance of the *cestui que trust*, the principal case is cited in *Campbell v. Foster*, 35 N. Y. 367; *Williams v. Thorn*, 70 Id. 274; *Hann v. Van Voorhis*, 5 Hun, 426; *Arzbacher v. Mayer*, 53 Wis. 393. In *Campbell v. Foster*, *supra*, and *Hann v. Van Voorhis*, *supra*, it was held, however, in accordance with a suggestion in the opinion of Mr. Justice Comstock, in the principal case, that under sections 38 and 39 of the New York revised statutes, no such bill is maintainable where the "trust has been created by, or the fund so held in trust has proceeded from, some other person than the debtor himself." But these cases were overruled on this point in *Williams v. Thorn*, 70 N. Y. 270. In *Stewart v. Foster*, 1 Hilt. 509, it is held, citing the principal case, that the proper mode of compelling the application of income accruing from a trust fund to the payment of a debt of the *cestui que trust* is by bringing an action against both the debtor and the trustee.

EQUITABLE CONVERSION OF REALTY INTO PERSONALTY, and *vice versa*: See *Baker v. Copenbarger*, 58 Am. Dec. 600; *Collins v. Champs Heirs*, 61 Id. 179; *Brothers v. Cartwright*, 64 Id. 563, and the cases cited in the notes thereto. To the point that where a will directs land to be converted into money it is to be considered in equity to be actually converted and to be treated as personalty, the principal case is cited in *Flanagan v. Flanagan*, 8 Abb. N. C. 417; *Gourley v. Campbell*, 6 Hun, 221; *Shumway v. Harmon*, 6 Thomp. & C. 627.

BELKNAP v. SEALEY.

[14 NEW YORK (4 KERNAN), 143.]

EQUITY WILL RESCIND CONTRACT FOR SALE OF LAND FOR MUTUAL MISTAKE AS TO QUANTITY of land which the boundaries given in the contract contained, where the deficiency is material, upon the application of the purchaser, if the mistake is clearly proved.

"MORE OR LESS," used in the contract in connection with the statement of the quantity, will not prevent granting such relief.

OBJECTION THAT CASE PROVED IS NOT THAT ALLEGED IN COMPLAINT, IF NOT SPECIFICALLY MADE AT TRIAL, IS NOT AVAILABLE on appeal, and a general exception that "as well upon the facts as the law" the appellant was entitled to recover will not raise the question.

APPEAL from a judgment relieving a purchaser of land from his contract, on the ground of mistake. The complaint alleged that plaintiff had contracted with defendant to purchase from

him a certain piece of ground in Brooklyn, being induced thereto by false and fraudulent representations by defendant that it contained eight acres and upwards, whereas it in fact contained only about four acres, on discovering which plaintiff demanded a return of one thousand dollars, paid by him as part of the price, which defendant refused. It demanded judgment for one thousand dollars and interest. The proof failed to show intentional fraud, as alleged, but clearly showed that the defendant represented the lot as containing upward of nine acres, that the quantity was a material inducement to plaintiff in making the purchase; and that the actual quantity was only a small fraction more than four acres. The contract referred to the deed by which defendant held the land for a description of the premises; and this deed described the land as "containing about nine acres, be the same more or less." The judge who tried the cause (without a jury) found for plaintiff, on the ground of mistake; and the full court affirmed his judgment.

William Curtis Noyes, for the appellant.

John Townsend, for the respondent.

By Court, COMSTOCK, J. The theory of the suit is distinctly that the plaintiff was induced to purchase the land by the false and fraudulent representations of the defendant in respect to the quantity which the tract contained. There is in the complaint no averment of mistake on either side, much less of mutual mistake. The judge who tried the cause found there was no fraud, but granted the relief prayed for solely on the ground that both parties acted under an innocent mistake. On this ground I should have great difficulty in upholding the judgment if the objection had been properly taken at the trial. The case shows that when the plaintiff rested, the defendant moved for a dismissal of the complaint, on the ground that no false or untrue representation had been made, and that no cause of action was made out. The ground thus taken simply asserted the actual truth of any representation proved to have been made by the defendant, and did not suggest that although it might be untrue there was no fraud. The general proposition, that no cause of action was made out, referred of course to the facts as proved, and did not call for a decision upon the question whether there was in the language of the code "a failure of proof" of the special case made by the complaint. In short, the ground taken was, that upon the facts as they were proved the law would give no relief.

There was also a general exception to the final decision of the judge, "as well upon the facts as the law of the case, that the plaintiff was entitled to recover." But the case nowhere shows that his attention was called to the objection that the case proved was not such as the plaintiff had stated in his complaint, and the general exception clearly does not present any such question. Where the trial is by the court, an exception may be made within ten days after notice of judgment: Code of 1851, sec. 268. But if the exception so made is general, as it was in this case, I think it only raises the question whether upon the facts as found the law has been properly decided, and that it does not present for the consideration of an appellate court a special objection, on the ground of variance between the complaint or answer and the proof. The case should show that such a ground was taken at the trial and overruled.

Upon the merits of the controversy the case is quite simple in its facts. The land in question is situated in the city of Brooklyn; and being valuable only for division and sale as city lots, its value is precisely in proportion to the quantity. In consideration of the gross sum of fourteen thousand dollars, of which one thousand dollars was paid down, the defendant agreed to convey the land to the plaintiff, describing it as "the premises conveyed to him by Samuel T. Roberts," by deed dated about nine months previous. The deed of Roberts contained a definite description by metes and bounds, and stated the quantity to be "about nine acres, more or less," excepting a certain parcel of one acre and six perches. The quantity in fact is only about half as much as the deed asserted. The plaintiff, in agreeing to purchase the tract at the sum named, acted under a mistake which affected the price nearly one half, and the judge has found that the seller was mistaken also. The defendant was guilty of no fraud, and it does not appear that he made any representations as to the quantity except the exhibition of the Roberts deed, and of a diagram made by himself or his agent, which had upon it a memorandum stating thus: "The deed calls for nine acres, less one acre and six perches sold." The plaintiff, before he agreed to buy, saw the land, and its boundary lines were visible. The city surveyor, however, and another witness testified that they could not judge by the eye how much land there was. The judge has found that the actual quantity was substantially and essentially less than the plaintiff supposed he was purchasing; and although the finding does not so state in terms, there can be no difficulty, I think, in affirming that if the

true quantity had been known the contract would not have been made. The agreement has never been consummated by a conveyance. These are the only essential facts in the case.

The counsel for the defendant is obliged to contend, and he does contend, that mere mistake as to the quantity of land affords no ground of relief against a contract in the terms of the present one, however serious such mistake may be, and although we can readily see the contract would never have been made if the quantity had been made known. The convenience of such a rule has been insisted on, and in the denial of justice it certainly has the merit of simplicity. If the doctrine is true as broadly as stated, then there is one class of contracts to which the settled maxim that equity will relieve against mistake can have no application. Upon a careful examination of the cases cited, as well as upon principle, my conclusion is, that agreements of this description are not necessarily proof against the maxims which apply to all others. There is some obscurity attending the general subject, and therefore a brief review of the leading cases cited in support of the doctrine contended for would seem to be proper. In the case of *Mann v. Pearson*, 2 Johns. 37, the action was upon a bond conditioned to convey to the plaintiffs a certain lot of land, containing six hundred acres. The lot was situated in the military tract, which had been surveyed into lots under public authority, and a map exhibiting the divisions had been filed in the office of the secretary of state. Before the suit was brought the defendant had conveyed the lot according to the condition of his bond. The deed described the lot, and stated the quantity of land to be six hundred acres, "be the same more or less." On an accurate survey the lot was found to contain only four hundred and twenty-one acres. The plaintiff claimed to recover the value of the deficiency in a suit on the bond; but the decision was against him, on the obvious ground that a bond or covenant to convey a known and definite lot of land was satisfied by a conveyance of the lot without regard to the number of acres. The question, of course, was one of construction purely in a court of law, and not one of mistake in a court of equity. The court had only to determine what the obligation meant according to its terms, and not whether any of the parties were entitled to be released from it on equitable grounds. The case of *Jackson v. Moore*, 6 Cow. 706, has quite as little to do with the question. That was an action of ejectment, and the only point decided supposed to have any bearing upon the present case was that a conveyance of a certain town-

ship of land, describing its size and the number of acres, carried to the grantee the whole township, although its area was in fact two miles greater in one direction than the description stated. The question of rescission or of compensation upon equitable grounds for the additional quantity of land was of course not involved. This case and that of *Mann v. Pearson*, *supra*, are the type of a class of cases sometimes cited, very inappropriately, I think, as authorities against equitable relief on the ground of mistake. The case of *Marvin v. Bennett*, 8 Paige, 312, S. C. on appeal, 26 Wend. 169, arose in equity. The contract of sale had been consummated by a conveyance, and a mortgage had been given back for the purchase money. The plaintiff claimed by his bill to rescind the sale on account of a small deficiency, less than one eighth, in the quantity of land. The premises were a lot in the village of Buffalo. The deed described it by metes and bounds, but did not specify the dimensions or quantity. It conveyed the lot, "more or less." In regard to misrepresentations outside of the conveyance, the vice-chancellor, Gardiner, not only held there were none, but he was of opinion that the parol evidence showed that "the risk as to the quantity of land constituted one of the elements of the agreement;" "and this fact," he added, "will be found to constitute the essential difference between this case and those which have been cited." The chancellor affirmed the decree upon the whole case, laying considerable stress upon the circumstances that the sale had been actually consummated by a deed, that the alleged deficiency was small, that the words "more or less" were inserted upon deliberation, and that the grantor distinctly refused to insert the dimensions or quantity of the lot in the deed after a negotiation on that subject. The decree was again affirmed in the court of errors, substantially on the same grounds on which it was decided before the vice-chancellor, Justice Cowen observing, in substance, that fraud was not alleged, and the proof only created a doubt whether there was any mistake. The president of the senate also observed that no fraud was established, or mutual mistake, such as to justify the interposition of a court of equity.

In *Veeder v. Fonda*, 3 Paige, 94, the purchaser at a master's sale was relieved from completing his purchase on account of an intentional concealment of the true quantity of land. In deciding the case on that ground, the chancellor made some observations quite unnecessary to his decision, but which will be found on examination by no means to deny that a purchaser can, in any case, be relieved from his contract on account of mis-

take as to quantity, especially where there is any element of misrepresentation, whether fraudulent or not. In the case of *Morris Canal Co. v. Emmett*, 9 Id. 168, which was a bill to foreclose a mortgage given for the purchase money, the defendant claimed a deduction on account of a small deficiency of five feet in seventy-five in one of the lines of a city lot. The sale was for a gross sum, and the dimensions of the lot were specified in the deed with the words "more or less." The allowance was denied. It does not appear from the case that there was any allegation or proof of mistake, and the decision, therefore, may well stand on the simple ground that compensation is not due for a mere deficiency alone, when the purchase is of such a character. The chancellor observed that there was no allegation or proof that the price to be paid had any reference to the actual depth of the lots. The absence of such a fact would be, clearly, fatal to the claim for relief against such a contract. In the course of his opinion, however, the chancellor stated the rule in such cases to be, that when there has been no fraud or misrepresentation the purchaser is neither liable for a surplus nor entitled to a deduction on account of deficiency. The rule, as he thus states it, is perhaps not hostile to the relief asked in the present case, inasmuch as it admits that a mere misrepresentation may be a ground of relief. But the remarks were unnecessary to the decision, and the authorities which he cites plainly show that they were not made upon deliberation. One of those authorities is *Mann v. Pearson*, 2 Johns. 37, already noticed, which, as we have seen, is entirely foreign to the question; and the others belong to the same class.

The case in this court of *Faure v. Martin*, 7 N. Y. 210 [57 Am. Dec. 515], throws no light upon the question. There the agreement was to sell a certain farm, described as "containing ninety-six acres, be the same more or less," at the price of sixty dollars per acre. The contract was afterwards consummated by a conveyance describing the quantity in the same manner, and a mortgage taken for part of the purchase money, computed on the number of acres specified, at sixty dollars per acre, precisely according to the agreement. The actual quantity was ascertained to be only eighty-six acres, and the suit was brought to stay the foreclosure of the mortgage, after tendering the amount due, with a deduction for the deficiency. The plaintiff offered to prove there was a mistake in respect to the quantity, induced by the the false and fraudulent representations made, both when the agreement and the deed were executed. But the fatal objection

to the proof and to the suit was, that the complaint alleged neither mistake nor fraud in the agreement, leaving the question one of construction purely, and the construction was held to be that the sale was in bulk, and that the number of acres and the sum to be paid per acre were specified only as a mode of arriving at the price in gross. The proof offered was rejected distinctly on the ground that it was inadmissible under the pleading, and on that ground the cause was decided. I need not say that the construction of a contract is one thing, and the question whether it should be rescinded, or relief granted against it on the ground of fraud or mistake, is quite another.

I have thus far noticed the cases in this state as most appropriate for us to follow, if they furnished the simple and comprehensive rule against relief which the appellant is obliged to contend for. It must, I think, be quite evident that they afford no such rule. Nor do I find that such a rule has ever been established in this country or in England. Sir Edward Sugden has stated the English cases with great precision and accuracy: 1 Sugd. Vend. 525, 526, marg. page. As the result of the cases, he lays down the rule cautiously in the following terms: "Where the contract rests *in fieri*, the general opinion has been that the purchaser, if the quantity is considerably less than it was stated, will be entitled to an abatement, although the agreement contains the words 'more or less,' or 'by estimation.'" Upon this authority, without a more special notice of the adjudged cases, it is safe to affirm that the comprehensive doctrine contended for has never been established in the English courts. In this country, looking beyond the courts of this state, the decision which leans more decidedly than any other in favor of the doctrine insisted upon is that of *Stebbins v. Eddy*, in the circuit court of the United States, 4 Mason, 414. In that case, the original contract was for the sale of a farm at fifty dollars per acre. Afterwards conveyances were given, in which the land was described by metes and bounds, and as containing forty-seven and a half acres, more or less. In fact, there were only forty acres; and the bill asked for a compensation for the deficiencies, alleging a fraudulent representation as to the quantity, on which the plaintiff relied in consummating the purchase. The defendant's answer denied the fraud, and insisted that the bargain was completed for the gross sum of two thousand five hundred dollars, admitting, however, that the quantity was then estimated at fifty acres, and that he himself believed and represented such to be the fact. It was held that the original agree-

ment to sell by the acre was rescinded, and a sale in gross substituted in closing the transaction. The relief prayed for was denied. Mr. Justice Story, in delivering the opinion, said that upon the structure of the bill, the only important question in the controversy was whether there had been a fraudulent misrepresentation of the quantity by the defendant. As the bill was framed, he held the case could not be dealt with on the ground of mere mistake. He decided that the denial of fraud in the answer was not overcome by the proof, and dismissed the bill. Before reaching this unanswerable ground of decision, however, the learned justice reviewed the cases upon the more general question, and some of his observations, certainly, tend strongly to the conclusion that relief will not be granted on the mere ground of mistake, where the purchase is for a gross sum, and there are words in the deed indicating that the quantity of land is uncertain and indefinite. The English cases which he cites are the same from which, as we have seen, Sir Edward Sugden entirely failed to deduce any such doctrine. His remarks are, moreover, qualified by the important concession that cases may occur of such extreme deficiency as to call for relief; but they must be, he adds, such as would naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract. A number of American cases in the other states were also referred to by Judge Story, and the same, with others, have been cited by the appellant's counsel. I have examined them all. In some of them the question was one of construction merely; in others the purchasers expressly took the risk of the quantity after being advised of a probable deficiency; all of them were determined upon their special circumstances, and none of them assert a rule so broad as the one contended for. On the whole, it may be confidently affirmed that there is not in the books a single adjudged case which determines that equity will not, upon the ground of mistake, relieve against a contract in the terms of the one before us, while such contract remains executory; and the mistake is so material that we can see it goes to the foundation of the agreement. On the contrary, there are cases less marked in their facts than the present one, directly determining the question the other way.

In the case of *Hill v. Buckley*, 17 Ves. 395, the agreement was for the sale of an estate containing, as stated in the particular prepared by the vendor's agent, two hundred and seventeen acres of woodland. The deficiency was twenty-six acres. The words "more or less" were not in the agreement, but it was ad-

mitted that so large a deficiency could not be included in those words. The representation contained in the particular was honestly made, but on account of the mistake an abatement in the price was allowed and a specific performance decreed. The master of the rolls observed that "though land is neither bought nor sold by the acre, the presumption is that, in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of." The case of *Portman v. Mill*, 2 Russ. 520, was a bill for specific performance filed by the vendor. The contract was for the sale of a farm, stating the quantity to be three hundred and forty-nine acres "or thereabouts, be the same more or less," and it contained a special stipulation that the parties should not be answerable for any excess or deficiency, and that the purchaser should take the land at the quantity above stated, whether more or less. The deficiency was about one hundred acres, which the answer set up and alleged that the contract was entered into under a mistake as to the quantity. On the coming in of the answer, the complainant moved for the usual reference as to the title. The lord chancellor refused the motion, suggesting that the defense might ultimately fail on the grounds of possession and acquiescence; but in regard to the special stipulation he said: "I can never agree that such a clause, if there were nothing else in the case, would include so large a deficiency as is alleged to exist here." This doctrine was laid down on the high authority of Lord Eldon. There are some other cases in the English courts to the same effect as those already mentioned: 1 Sugd. Vend. 528, 529; *Price v. North*, 2 You. & Coll. 620; *Day v. Fynn*, Owen, 133. In the case of *Thomas v. Perry*, 1 Pet. C. C. 49, there was an executed grant of all the lands of the grantor in a certain county, "containing in the whole about two thousand six hundred acres, be the same more or less." There was a surplus over the quantity stated of nearly one thousand acres, and it was held the purchaser must account for it. Mr. Justice Washington observed that "where the land sold is said to contain about so many acres, both the grantor and grantee consider these words as a representation of the quantity which the grantor expects to sell and the grantee to purchase. The words "more or less" are intended to cover a reasonable excess or deficit. If the difference between the real and the represented quantity be very great, both parties act obviously under a mistake, which it would be the duty of a court of equity to correct.

A similar doctrine has been laid down in a number of other

American cases, some of which are direct adjudications in favor of the principle: *Nelson v. Matthews*, 2 Hen. & M. 164 [3 Am. Dec. 620]; *Quesmel v. Woodlief*, Id. 173, and note; *Bailey v. Snyder*, 13 Serg. & R. 160. If there is any principle of equity on which relief can ever be granted against contracts of the general character of the one under consideration, upon the ground of mistake, and I think the cases quite uniformly concede that there is, the circumstances of the present case are highly favorable to its application. Here the contract has not been consummated by a conveyance, a distinction which has been very generally made; here the difference between the real and the supposed quantity of land is so great as necessarily to imply a mistake which goes to the essence of the contract, while many of the cases have held the error too small to warrant interference with the agreement; and in some of them mistake was neither alleged nor proved, but relief was claimed on the simple ground of deficiency alone. Here, too, I think, we should hold there was an actual misrepresentation, while in some of the cases that feature is entirely wanting. The exhibition by the vendor of his title-deed, and of the diagram of the land with the memorandum upon it, must be deemed equivalent to a statement of the quantity, qualified only by the words "more or less." If the deed to which the agreement in question refers had not contained this qualifying clause, there would be little doubt upon any of the cases that relief should be given against the mistake. In my judgment, far too much significance has been sometimes allowed to these and similar words. Their primary use is to show that all the land embraced within the description is intended to pass, and in that sense they are often important in the construction of the instrument. They may be decisive also upon a question of how much consideration is to be paid, or of mere compensation where actual mistake does not appear. And where misrepresentation and mistake are claimed, they certainly qualify the statement of quantity which the instrument otherwise imports. They do not qualify it, however, by any means, to the extent supposed. A deed which describes the land and states the number of acres, although with the words "more or less," clearly imports that there is not a great deficiency or excess. If the deficiency is one half, the instrument carries on its face a gross misrepresentation. And it is quite material to observe that such words do not import a special engagement that the purchaser takes the risk of the quantity. Their presence in a contract or deed may render it more difficult

to prove such a mistake as will justify the interference of equity, but they are not equivalent to a stipulation that the mistake, when ascertained, shall not be a ground of relief. Even if that construction were to be placed upon them, it would still hold true that the contract, viewed in that light, may be entered into under misrepresentation and error so gross that it should not be allowed to stand.

I am of opinion that the judgment should be affirmed, and I put my conclusion on the grounds that the contract is yet executory; that there was an actual misrepresentation of the quantity of land, although not fraudulently made; and that the mistake induced thereby so essentially affected the agreement, that upon the settled maxims of equity it ought to be annulled.

DENIO, C. J., and A. S. JOHNSON, MITCHELL, and HUBBARD, JJ., concurred in the foregoing opinion.

T. A. JOHNSON, J., delivered a dissenting opinion.

WRIGHT, J., concurred in the opinion of T. A. JOHNSON,

SELDEN, J., took no part in the decision.

Judgment affirmed.

MISTAKE OF MATERIAL FACT AS GROUND OF RELIEF against contract for sale of land: See *McCobb v. Richardson*, 41 Am. Dec. 374; *Trigg v. Read*, 42 Id. 447; *Sutton v. Sutton*, 56 Id. 109, and the notes thereto. As to relief in equity on the ground of mistake, in cases of contracts generally, see *Brown v. Bonner*, 31 Id. 637; *Champlin v. Laytin*, Id. 382; *Jenks v. Fritz*, 42 Id. 227; *Belt v. Mehan*, 56 Id. 329; *Miles v. Stevens*, 45 Id. 621, and notes.

THE PRINCIPAL CASE IS CITED with approval, as an authority upon this subject, in *Payne v. Elyea*, 50 Ga. 404; *Estep v. Larsh*, 21 Ind. 195; *Solinger v. Jewett*, 25 Id. 482; *Sandford v. Travers*, 7 Bosw. 508; *Wilson v. Randall*, 7 Hun, 16; S. C., 67 N. Y. 342, 343; *French v. Abenheim*, 20 Id. 8; *Paine v. Upton*, 21 Id. 311; *Hammond v. Pennock*, 5 Lans. 361; *Smith v. Mackin*, 4 Id. 46; *Lawrence v. Staigg*, 8 R. I. 271.

THAT WHERE CONTRACT IS EXECUTED, COURT IS SLOW TO RESCIND IT, even for causes which would be deemed to warrant rescission if it had remained *in fieri*, is a point to which the principal case is cited in *Lawrence v. Staigg*, 8 R. I. 271. The case was distinguished in *Whittemore v. Farrington*, 7 Hun, 395, as one of executory contract, and it was held that where two agreed to exchange lands, and plaintiff, having received a quitclaim deed, discovered that there was a mortgage on the land and sought to rescind, but could not restore the land because he had leased it, he had no remedy to recover back the price paid nor moneys expended on the land, there being no deceit or concealment, and also that the court could not reform the contract. As to the necessity of restoring what has been received under a contract, and placing the parties *in statu quo* on rescission of a contract, see *Johnson v. Jackson*, 61 Am. Dec. 522; *Bailey v. James*, 62 Id. 659, and cases cited in the notes thereto.

"MORE OR LESS," IN DESCRIBING QUANTITY OF LAND in a contract or conveyance: See *Blaney v. Rice*, 32 Am. Dec. 204; *Bullard v. Copps*, 37 Id. 561; *Couse v. Boyles*, 38 Id. 514; *Jones v. Plater*, 41 Id. 408; *Dow v. Jewell*, 45 Id. 371; *Frederick v. Youngblood*, 54 Id. 209; *Faure v. Martin*, 57 Id. 515, and notes. The principal case is cited in *King v. Brown*, 54 Ind. 375, to the point that where, in a contract for the sale of land, the number of acres is stated to be four hundred and fifty-one, "more or less," and there turns out to be a deficiency of fifty-four acres, the purchaser is entitled to an abatement, where there is no fraud, misrepresentation, or mutual mistake, and the land is not bought for any purpose requiring a particular number of acres.

VARIANCE AND FAILURE OF PROOF.—As to the effect of a variance between the allegations and proofs, or a failure of proof, see *Patton v. McGrath*, 33 Am. Dec. 98; *Dudley v. Lindsey*, 50 Id. 522; *McPherson v. McPherson*, 53 Id. 416; *Bolles v. Beach*, Id. 263. That a total variance is a ground of dismissal, if the motion is put on that ground, the principal case is cited in *Field v. Syms*, 2 Robt. 42. Only causes of action stated in the complaint can be recovered on, and concurrent and intimate causes of action cannot, as a matter of course, be given in evidence, nor made the basis of a verdict under a statute declaring that there shall be but one form of action: *Benedict v. Bray*, 56 Am. Dec. 332. A judgment based on proof of an entirely different claim from that alleged is held erroneous, even though the proof was not objected to, in *Deleau v. Simonson*, 3 Jones & S. 246, citing the principal case. The case is cited also to the point that where there is a total failure of proof, the plaintiff cannot amend so as to conform his pleading to the facts proved: *Rosebrooks v. Dinmore*, 4 Robt. 674; reversed in 5 Abb., N. S., 59. In *Ross v. Mather*, 71 N. Y. 111, the case is referred to as an authority on the point that on a complaint for tort the plaintiff establishing a case in *assumpsit* only cannot recover, and is distinguished from the case at bar. As to when and how objections to a variance or failure of proof are to be taken, see *Driggs v. Dwight*, 31 Am. Dec. 283; *Jones v. Hardesty*, 32 Id. 180; *Phillips v. Runnels*, 43 Id. 109; *Chandler v. Walker*, 53 Id. 202, and notes. In *Doyle v. Mulreim*, 1 Sweeny, 521, S. C., 7 Abb. Pr., N. S., 264, the principal case is cited to the point that an objection, that the cause of action proved is not that alleged, and that the complaint is unproved in its entire scope and meaning, must be taken at the trial to be available on appeal, and that a motion to dismiss the complaint without specifying the grounds is insufficient to raise the question. In *Patterson v. Patterson*, 1 Robt. 188, S. C., 1 Abb. Pr., N. S., 266, the case is also cited to the point that an exception that a cause of action found by a referee was not set forth in the complaint is necessary in some instances, but that taking the objection on a motion before the referee to dismiss the complaint after the plaintiff's evidence is closed is sufficient on appeal. If no objection is made that the facts proved upon which the plaintiff seeks relief are wholly different from those alleged, and the questions have been fully and fairly tried, the court will sometimes retain the case and give relief, as where an incumbrance is sought to be removed as void on one ground and is proved void on another: *Stowell v. Haslett*, 5 Lans. 383, citing the principal case. Generally it is too late to interpose an objection to a recovery based merely on the form of the action or the form of relief asked: *Voss v. Florida R. R. Co.*, 50 N. Y. 376.

GENERAL AND SWEEPING OBJECTIONS INSUFFICIENT: See *Dickey v. Malechi*, 34 Am. Dec. 130; *Parker v. Flagg*, 45 Id. 101; *Haggart v. Morgan*, 55 Id. 350; *Hart v. Rensselaer etc. R. R. Co.*, 59 Id. 447; *Coons v. Renick*, 60 Id. 230, and notes. An exception "to the ruling of the referee dismissing the

complaint," or "to the report of the referee," is too general, and at most merely raises the question whether upon the facts found the law was properly decided: *Anderson v. West*, 6 Jones & S. 447, citing *Belknap v. Sealy*.

ON MOTION TO DISMISS COMPLAINT AT CLOSE OF PLAINTIFF'S TESTIMONY, the moving party, if required, must state his grounds, and having done so, he cannot rely on others in the appellate court: *Abernethy v. Society*, 3 Daly, 9, citing the principal case. The case is distinguished in *Field v. Syme*, 2 Robt. 38, as not militating against the rule that whether the grounds of a motion to dismiss the complaint are stated or not, if they are sufficient in law, a refusal to dismiss is error.

TRACY v. TALMAGE.

[14 NEW YORK (4 KERNAN), 162.]

BANKING CORPORATION ISSUING TIME PAPER IN VIOLATION OF STATUTE, IN FULFILLMENT OF CONTRACT OTHERWISE VALID, is alone the offender; the penalty does not attach to the other party to the transaction.

FREE BANKING ASSOCIATIONS, formed under the New York free banking law of 1838 (Laws 1838, p. 245), have power to carry on business only in the manner and to the extent authorized by the act; they cannot purchase stocks for the purpose of selling them again at a profit.

SELLER'S MERE KNOWLEDGE THAT BUYER IS PURCHASING THING WITH CRIMINAL INTENT, to put it to unlawful use, does not defeat his action for the price, on the principle of denying relief to a party *in pari delicto*. Thus one who sells stocks to a corporation, although he knows that the corporation is purchasing to sell again as a speculation, contrary to a penal provision in the charter, may nevertheless recover, on an implied *assumpsit*, the value of the stocks; otherwise when the contract provides for the illegal use of the thing sold, or when the seller does any act to promote it.

APPEAL from a decree of the former court of chancery, allowing a claim against a banking association, and directing payment by the receiver. The association in question was the North American Trust and Banking Company, which was organized under the New York free banking law of 1838, and in course of time became insolvent, and passed into the hands of a receiver. Among the claims presented to him was one on behalf of the state of Indiana for one hundred and seventy-five thousand dollars, in the form of eighteen certificates of deposit of the denominations of nine thousand dollars or ten thousand dollars each, dated January 2, 1841, and payable, with interest, at periods varying from five to twenty-two months after date. These certificates were renewals of others previously given, and they again traced their origin to a written agreement of January 18, 1839, between the trust company and the Morris Canal Company, act-

ing as agents of the state of Indiana, which, without evincing any particular purpose of the sale, provided that the canal company should sell to the trust company twelve hundred bonds of the state of Indiana, and that the trust company should give in payment its negotiable obligations, payable on time, with interest. The banking laws of the state did not purport to authorize the trust company to buy such bonds for speculation (which appeared from the proof, not from the contract, to have been the purpose), and forbade it from issuing obligations payable at a future time; and the effect of these restrictions on the transaction of January 18, 1839, was the question in controversy. The receiver, on grounds specifically stated in the opinion, disputed the validity of the certificates of deposit, as being mere renewals of obligations unlawfully given. The supreme court held them enforceable; and the receiver appealed. These and other details of the controversy may be learned from the decision below. Reported: 18 Barb. 456; 9 How. Pr. 530; 12 New York Leg. Obs. 302.

Samuel Beardsley, for the appellant.

Charles Edwards, for the respondent.

By Court, SELDEN, J. To avoid confusion, I shall consider this case in the first instance as though the Morris Canal and Banking Company, instead of the state of Indiana, was the claimant upon the record. The general ground upon which the claim is resisted is that it arises upon an illegal contract. Three grounds of illegality are alleged: 1. That the purchase of state stocks by the North American Trust and Banking Company for the purpose of resale, upon speculation, was beyond the scope of its corporate powers, and therefore illegal, and that the Morris Canal and Banking Company knew that such was the object of the purchase; 2. That the North American Trust and Banking Company had no power to issue negotiable promissory notes upon time; that such notes, therefore, and the contract of sale which provided for receiving them in payment, are illegal and void; 3. That the certificates or post-notes delivered in payment for the state stock, being calculated and intended for circulation, were issued in violation of the restraining act; and that the Morris Canal and Banking Company was *particeps criminis*.

In examining the first of these grounds, I shall not notice the position taken by the counsel for the receiver, that a mere excess of authority on the part of a corporation in making a

contract is equivalent in its effect to the violation of a positive penal enactment; because so far as the alleged illegality consists in the purpose for which the stocks were purchased, the case can, I think, be disposed of upon principles which do not involve that question. That the North American Trust and Banking Company made the purchase with a view to a resale, and not to a deposit with the comptroller, seems to be established by the proof; and that such a purchase and resale were unauthorized and beyond the scope of the corporate powers of the company, was settled by this court in the case of *Talmage v. Pell*, 7 N. Y. 328.

It is contended by the counsel for the claimant that there is no evidence that the vendors, the Morris Canal and Banking Company, had any knowledge of the object of the vendees in making the purchase. I shall, however, assume that they had such knowledge; because, in the view I take of the subject, it cannot affect the result. The question presented upon this branch of the case is, whether the bare knowledge by a vendor that the purchaser intends to make an unlawful use of the article sold will prevent a recovery for the purchase money. Although I deem this question clear upon principle, I shall nevertheless rest my opinion in regard to it mainly upon the authorities.

A question somewhat analogous arose in the court of king's bench, in England, in the case of *Faikney v. Reynous*, 4 Burr. 2069. The plaintiff and one of the defendants had been jointly concerned in stock-jobbing, and the plaintiff, in contravention of an express statute, had advanced three thousand pounds, in compounding certain differences, for one half of which the defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the court held the plaintiff entitled to recover. Although that case differs from the one under consideration in its facts, yet the principle upon which the case was decided, viz., that a party to a contract, innocent in itself, is not responsible for, or affected by, the use which the other may make of the subject of the contract, is equally applicable here. Lord Mansfield said, in speaking of the act of the defendant in giving the bond: "This is not prohibited. He is not concerned in the use which the other makes of the money; he may apply it as he thinks proper. But certainly this is a fair, honest transaction between these two."

There is a class of English cases which seems to me identical in principle with the present, and concerning which the decis-

ions have been unvarying. I refer to the cases of goods purchased for the-express purpose of being smuggled into England in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of *Holman v. Johnson*, Cowp. 341, where the plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea, knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held, upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in *Faikney v. Reynous*, 4 Burr. 2069, that mere knowledge by the vendor of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord Mansfield, who delivered the opinion in this case also, says: "The seller indeed knows what the buyer is going to do with the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods."

Where, however, the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as *particeps criminis*, and cannot recover; as is shown by the subsequent cases of *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 Id. 466; and *Waymell v. Reed*, 5 Id. 590. These were all cases where the plaintiff had sold goods to the defendant knowing that they were to be smuggled into England, and in each of them the plaintiff was nonsuited. But they all differed from the case of *Holman v. Johnson*, *supra*, in this, that the plaintiff had in each case done some act, in addition to the sale, in aid and furtherance of the defendant's design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of Buller, J., in the case of *Waymell v. Reed*, *supra*, is very explicit. He says: "In *Holman v. Johnson*, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling by packing the goods up in a manner most convenient for that purpose."

In each of the three cases last cited special care is taken to guard against any inference that it was intended to impair the force of the decision in *Holman v. Johnson*, *supra*. Indeed, that decision seems to have been uniformly followed by the courts of England from that day to the present. In 1835 the question

again arose, in the case of *Pellecat v. Angell*, 2 Crompt. M. & R. 311, and the court held that the plaintiff could recover the price of goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into England. Lord Abinger says: "The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act." Again he says: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract of which the smuggling was an essential part." It is true, the chief baron in one part of his opinion seems to lay some stress upon the fact that the plaintiff was a foreigner; but it is clear that this can have nothing to do with the principle upon which those cases rest, which is, that the act of selling is not in itself a violation of the law; and the mere fact of knowledge of the unlawful intent of the vendee does not make the vendor a participator in the guilt. The language of the associates of the chief baron goes to show that the domicile of the plaintiff had no influence upon the decision. Bolland, B., says: "I think the distinction pointed out by the lord chief baron between merely knowing of the illegal purpose and being a party to it by some act is the true one." Alderson, B., says: "If the plea disclosed circumstances from which it followed that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of law." That the place of residence of the vendor has nothing to do with the question, and that the principle of the case of *Holman v. Johnson*, Cowp. 341, is sound, is further shown by the case of *Hodgson v. Temple*, 5 Taunt. 181, decided by the court of common pleas in England. There, as it would seem, all the parties resided in London. The plaintiffs, who were distillers, had sold spirituous liquors to the defendant, with full knowledge that the latter intended to retail them, in express violation of the revenue laws. It was insisted, in defense to an action brought for the purchase money of the liquors, that the plaintiffs were *particeps criminis*, and could not recover. But Mansfield, C. J., said: "This would be carrying the law much further than it has ever yet been carried. The merely selling goods knowing that the buyer will make an illegal use of them is not sufficient to deprive the vendor of his just right of payment; but to effect that, it is

necessary that the vendor should be a sharer in the illegal transaction."

Opposed to this series of cases holding one uniform language, and sanctioned by such names as Mansfield, Buller, Kenyon, Abinger, and others, I know of but a single English case, viz., that of *Langton v. Hughes*, 1 Mau. & Sel. 593. By a statute of 42 Geo. III., brewers were prohibited from using anything but malt and hops in the brewing of beer. The plaintiffs, who were druggists, had sold to the defendants, who were brewers, certain drugs, knowing that they were to be used contrary to the statute. In the 51 Geo. III. another statute was passed prohibiting druggists from selling to brewers certain articles, and among them those sold to defendants. The sale in question was made before the latter statute, but the suit was brought afterwards. The court held that the plaintiff could not recover. It is difficult to ascertain from the opinions the precise ground upon which the court intended to rest its decision. The case was so clearly within the terms of the statute of 51 Geo. III. that the judges were evidently induced to resort to a somewhat strained construction of the previous statute, and even to an attempt to connect that with the statute passed after the sale, for the sake of sustaining the defense. Le Blanc, J., after stating the question, says: "That depends upon the provisions of 42 Geo. III., coupling them in their construction with those of 51 Geo. III." It is apparent, I think, upon a review of the whole case, that it was not very well considered, and that the decision was really produced by the reflex influence of the latter statute. This case, therefore, which does not appear to have been followed either in England or in this country, and which is virtually overruled by the subsequent case of *Pellecat v. Angell*, 2 Crompt. M. & R. 311, can have but little weight in opposition to the numerous authorities to which I have referred, going to establish the contrary principle.

There is another class of English cases which have been sometimes supposed to conflict with the doctrine advanced in *Faikney v. Reynous*, 4 Burr. 2069, and *Holman v. Johnson*, Cowp. 341, but which, when the precise ground upon which they were decided is considered, will be found to support rather than to detract from the doctrine. That ground is this: that it was the express object of the plaintiffs in those cases, in selling the goods or lending the money, that they should be used for an unlawful purpose, and that such purpose entered into and formed a part of the contract of sale or loan. A brief reference to those cases

will show that this is the principle upon which they rest. The first case of this class is that of *Lightfoot v. Tenant*, 1 Bos. & Pul. 551. The action was upon a bond given for goods sold, and the defendant pleaded that the plaintiff sold the goods "in order that" they should be shipped to the East Indies without the license of the East India Company, in violation of an express statute. The issue upon this plea was found for the defendant, and a motion for judgment *non obstante veredicto* was denied. Eyre, C. J., argues that, the jury having found that the plaintiff sold the goods "in order that" they should be shipped, etc., it cannot be said that he had no interest in their future destination; that he may well have sold the goods for an enhanced price, relying exclusively upon the profits to be realized from the illicit trade for payment. He says: "It is a possible case that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise, but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade." Again he says: "But the jury having found for the plea, the court cannot say that the plaintiff had nothing to do with the future destination of the goods, unless it was impossible to state a case in which they could have anything to do with it." The decision in this case clearly is based upon the fact that the future use to be made of the goods entered into and formed a part of the contract of sale. There are two other English cases belonging to the same class. The first is that of *Cannan v. Bryce*, 3 Barn. & Ald. 179. The defendant had lent money to a firm, which afterwards became bankrupt, for the purpose of paying a balance due upon certain illegal stock-jobbing transactions, and which had been applied to that object. He having afterwards received money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant could not set off his demand for the money loaned. The other case is that of *McKinnell v. Robinson*, 3 Mee. & W. 434, which was an action of *assumpsit* for money lent. The defendant pleaded that the money was lent in a certain common gambling-room for the purpose of the defendant's illegally playing and gaming therewith; and on demurrer the plea was held good. In each of these cases it will be seen that the illegal use was the

express object for which the money was lent; and thus is relied upon by the court in both cases in giving their judgment. In the case of *Cannan v. Bryce*, *supra*, Abbott, C. J., says: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. And in the case of *McKinnell v. Robinson*, *supra*, Lord Abinger, in stating the principle by which the case was governed, says: "This principle is that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced."

It is worthy of note that the three cases last referred to present the views respectively of the heads of the three principal English courts, viz.: Abbott, chief justice of the king's bench, Eyre, chief justice of the common pleas, and Abinger, chief baron of the exchequer; and their concurrence in resting their decisions upon the fact that the illegal object was in the contemplation of both parties, and formed a part of the original contract, goes strongly to confirm the doctrine of the cases of *Faikney v. Reynous*, 4 Burr. 2069; *Holman v. Johnson*, Cowp. 341, etc. Indeed, the whole current of English authority goes to support those cases, with the single exception of *Langton v. Hughes*, 1 Mau. & Sel. 593. They have also frequently been referred to by the courts in this country as containing sound doctrine: *De Groot v. Van Duzer*, 17 Wend. 170; *Merchants' Bank v. Spalding*, 12 Barb. 302; *Armstrong v. Tbler*, 11 Wheat. 258. In the latter case Chief Justice Marshall refers to the case of *Faikney v. Reynous*, *supra*, in the following terms: "The general proposition stated by Lord Mansfield, in *Faikney v. Reynous*, that if one person pay the debt of another, at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case."

The principles established by this strong array of authorities are in entire accordance with the case of *Talmage v. Pell*, 7 N. Y. 328, decided by this court. It was a part of the contract in that case, between the banking company and the commissioners of the state of Ohio, that the bonds should remain in the hands of the agent of the state, to be sold on account of the banking company; and this fact is referred to and relied upon by Gardiner, J., by whom the opinion of the court was delivered. He says: "I am,

for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling, as a means of obtaining money to discharge existing liabilities; that as the object of the purchase in this case was known to both parties, and made a part of their contract, the debt for the purchase money cannot be enforced by the vendors, and that the collateral securities must stand or fall with the principal agreement." The case contains no intimation whatever that the mere knowledge by the agents of the state of Ohio that the banking company purchased the bonds with a view to a resale would have defeated a recovery. On the contrary, such an inference was carefully guarded against by the learned judge who delivered the opinion, as appears from the extract just given.

I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defense to an action brought to recover the price of goods sold that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design. If, in this case, the bank had had no right to purchase state stocks for any purpose, then the contract of sale would have been necessarily illegal, and the vendor would, perhaps, be precluded from all remedy for the purchase money. But here the purchase and sale for a lawful object was a contract which each party had a perfect right to make. Suppose the banking company, although intending at the time of the purchase to use the stocks for trading purposes, had, the next day, abandoned this intention, and deposited them with the comptroller, would this change of purpose reflect back upon the contract of purchase, if it was corrupt, and divest it of its illegal taint? This could hardly be pretended; and if not, then the consequence of the doctrine contended for here would inevitably be that the vendor of the stocks, without having participated in any illegal act, or even illegal intent, but having simply known of such an intent subsequently abandoned, would be punished with a total loss of the property sold, and that for the benefit of the party alone guilty, if guilt could be predicated of such a transaction.

I am not aware of any principle which could justify this. The law does not punish a wrongful intent when nothing is done to carry that intent into effect; much less bare knowledge of such an intent without any participation in it. Upon the whole, I

think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily *per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money.

It follows from this that the sale of the stocks would have created a valid and legal obligation on the part of the banking company to pay the purchase money but for the form of the security agreed to be taken in payment; and this brings me to the consideration of the second ground of defense, viz., that the North American Trust and Banking Company had no authority to issue negotiable promissory notes, payable at a future day; and consequently, that the contract which provided for their issue, and for receiving them in payment, was illegal and void.

In considering this branch of the case, I shall not examine at length the questions so ably argued at bar in regard to the nature of corporations and the limitations of their powers, but shall assume it to have been established, for the purposes of this case at least, that associations under the general banking law, even prior to the act of 1840, Laws of 1840, 306, sec. 4, had no power to issue negotiable notes upon time; placing this assumption, however, not upon the safety-fund act of 1829, Laws of 1829, 167, but upon the general principle of law which limits corporations to the exercise of powers expressly given to them, or such as are necessarily incident thereto, and upon the statute confirmatory of that principle: 1 R. S. 600, sec. 3.

It follows that in issuing the certificates or post-notes delivered to the Morris Canal and Banking Company in consideration of the stocks transferred, the North American Trust and Banking Company exceeded its corporate powers. That those certificates were negotiable promissory notes, is clear: *Bank of Orleans v. Merrill*, 2 Hill (N. Y.), 295; *Leavitt v. Palmer*, 3 N. Y. 19 [51 Am. Dec. 333]; *Talmage v. Pell*, 7 Id. 328. Does this act of the Trust and Banking Company, thus transcending its legitimate powers, so taint and corrupt the contract of sale as to deprive the vendors of the stocks of all remedy for the purchase money? The counsel for the claimants sought, upon the argument, to maintain that the sale of the stocks and the receipt of the certificates were distinct transactions, and hence that the debt credited by the sale would remain, notwithstanding the illegality of the securities. In this, however, he is not sustained, I think, by the evidence. The proof seems to be clear that the agreement to receive the certificates or post-notes was simul-

taneous with and formed a part of the contract of purchase. It becomes necessary, therefore, to meet the question whether the consent and agreement of the vendors to receive the certificates in payment will prevent a recovery in any form for the stock sold.

It results, from what has been previously said, that there was nothing in the contract of sale, considered by itself, separately from the agreement in relation to the security, to impair the validity of the debt; but, on the contrary, that the sale of the stocks created as valid and meritorious a consideration for the obligation assumed by the trust and banking company as if the money had actually been deposited according to the tenor of the certificates. The objection to the claim, therefore, rests upon the nature of the securities alone, and acquires no additional force from the want of power in the trust and banking company to traffic in stocks.

It has long been settled that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either *malum in se* or prohibited by some positive statute, are void. But the application of this rule to contracts made by corporations, the sole objection to which consists in their being *ultra vires*, is comparatively modern. The doctrine rests mainly upon three recent English cases, viz.: *East Anglian Railway Co. v. Eastern Counties Railway Co.*, 7 Eng. L. & Eq. 505; *McGregor v. Official Manager of Deal & Dover Railway Co.*, 16 Id. 180; and *Mayor of Norwich v. Norfolk Railway Co.*, 30 Id. 120.

That a contract by a corporation which it has no legal capacity to make is void, and cannot be enforced, it would seem difficult to deny; and this principle alone is abundantly sufficient to sustain the cases above cited, which were all actions founded upon and affirming the validity of the illegal contract. But it is quite another question whether such a contract is so tainted with corruption that the party dealing with the corporation will be refused all remedy in a suit proceeding upon the ground of a disaffirmance of the contract, and asking only such relief as equity demands. Whether a contract of this nature can fairly be brought, consistently with either reason or adjudged cases, within the range of the maxim, *Ex turpi causa non oritur actio*, cannot be considered as settled by the cases referred to; especially, as in the last of those cases the court was equally divided, and it was only disposed of by one of the judges withdrawing his opinion with a view to an appeal.

Prior to the case of *East Anglian Railway Co. v. Eastern Counties Railway Co.*, 7 Eng. L. & Eq. 505, the rule which denied all relief, in equity as well as at law, to any party to an illegal contract, had been generally applied only to cases where the contract was either *malum in se* or specifically prohibited by statute. It was wholly unnecessary to the decision of that case to resort to any extension of that rule; because, to enforce a contract against a party which that party was incompetent in law to make would indeed be, in the language of some of the cases, "to make the law an instrument in its own subversion." The courts, however, in that as well as the two subsequent cases, do appear to have been inclined to hold that contracts of corporations which are *ultra vires* merely come within the general rule which denies all aid to either party to a contract made in violation of law. But it will not be necessary here to pass upon the correctness of this doctrine advanced in those cases, as in the view I take of this case it falls clearly within an exception to that rule; and for the purposes of this question I shall concede: 1. That the issuing and delivery by the North American Trust and Banking Company of its promissory notes payable on time was *ultra vires*; and that the effect of this upon the contract was the same as if it had been specifically prohibited under a penalty; and 2. That the notes issued were calculated and intended for circulation as money, and were therefore issued contrary to the inhibitions of the restraining act. These concessions are made for the purposes of this case only, and without intending definitely to decide the points conceded.

There are one or two classes of cases to which it will be necessary to refer in order to afford a clear view of the question here presented. The first consists in a series of cases in which a distinction has been taken between those illegal contracts where both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim, *Ex dolo malo non oritur actio*, is qualified by another, viz., *In pari delicto melior est conditio defendentis*. Unless, therefore, the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract be illegal, will afford relief, where equity requires it, to the more innocent party.

It was insisted by the counsel for the receiver, upon the argument, that in no case would relief be afforded to any party to an illegal contract unless he applied for such relief, or at least

had elected to disaffirm the contract while it remained executory. This position cannot, I think, be sustained. It overlooks distinctions which are clearly settled. The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto* form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se*, the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves moral turpitude nor violates any general principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not *in pari delicto*; or 2. In some cases where he elects to disaffirm the contract while it remains executory. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second, it is equally unimportant that the parties are *in pari delicto*. This will clearly appear upon a brief review of some of the leading cases.

The first case which I deem it material to notice is that of *Smith v. Bromley*, Doug. 670, in note. The plaintiff's brother having become bankrupt, and a commission having been taken out against him, the plaintiff advanced forty pounds to the defendant, who was the principal creditor, to induce him to sign the certificate. The action which was brought to recover this money was sustained. In reply to the argument that the plaintiff was seeking to recover back money paid upon an illegal contract, Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action; for when both parties are equally criminal against such general laws, the rule is, *Potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violations of the one sort and the other." Two things are to be noted in this extract: that a distinction is taken between contracts *malum prohibitum* merely, and such as are immoral or contrary to general principles of policy; and also that stress is laid upon the fact that the law contravened in this case was intended to protect one party from oppression by

the other. The first is a valid distinction which runs through all the subsequent cases; the last was merely incidental to the particular case, and not essential to the principle. The first cases in which the principle was applied were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other, because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.

The case of *Jaques v. Golightly*, 2 W. Black. 1073, was an action brought to recover back money paid for insuring lottery tickets.

The defendant kept an office for insurance contrary to the statute of 14 Geo. III., c. 76. It was urged that the plaintiff being *particeps criminis*, and having knowingly transgressed a public law, was not entitled to relief; but the action was sustained by the unanimous opinion of the court. Blackstone, J., said: "These lottery acts differ from the stock-jobbing act of 7 Geo. II., c. 8, because there both parties are made criminal and subject to penalties." The rule here suggested for determining whether the parties are *in pari delicto* seems reasonable and just. There are, undoubtedly, other cases in which the parties are not equally guilty; but it is safe to assume that whenever the statute imposes a penalty upon one party and none upon the other they are not to be regarded as *par delictum*. In *Browning v. Morris*, 2 Cowp. 790, Lord Mansfield, after referring with approbation to the case of *Jaques v. Golightly*, *supra*, reiterates the argument of Blackstone, J., in that case. He says: "And it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office-keeper."

The question next arose in the case of *Jaques v. Withy*, 1 H. Black. 65, which is identical with the case of *Jaques v. Golightly*, *supra*, decided by the same court fifteen years before. The action was brought to recover back money paid for insurance to the keeper of a lottery insurance office, and it was held to lie. It will be seen that these two cases are not like that of *Smith v. Bromley*, Doug. 670, where an undue advantage was taken of the peculiar situation of the plaintiff; and that although some effort is made in *Jaques v. Golightly*, *supra*, and by Lord Mansfield in *Browning v. Morris*, *supra*, to bring them within the

reasoning of that case, they are really placed upon the broad ground that the parties are not *in pari delicto*, and as evidence of this the court rely upon the fact that the penalty was imposed upon the defendant alone. A similar question came before the court of king's bench in the case of *Williams v. Hedley*, 8 East, 378, where the previous cases were ably and elaborately reviewed by Lord Ellenborough. The action was brought to recover back money which had been paid by the plaintiff to compromise a *qui tam* action pending against him for usury. The principle of the decision cannot be better stated than by transcribing the head-note of the reporter, which is this: "Money paid by A to B, in order to compromise a *qui tam* action of usury brought by B against A on the ground of a usurious transaction between the latter and one E, may be recovered back in an action by A for money had and received. For the prohibition and penalties of the statute of 18 Eliz., c. 5, attach only on the informer or plaintiff or other person suing out process in the penal action making composition, etc., contrary to the statute, and not upon the party paying the composition; and therefore the latter does not stand in this respect *in pari delicto*, nor is he *particeps criminis* with such compounding informer or plaintiff."

These are the leading English cases on this subject; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other; and equally plain that relief is granted in this class of cases entirely irrespective of the question whether the contract be executed or executory. It was, in fact, executed in all these cases.

The series of cases here referred to have never been overruled. On the contrary, they have been expressly sanctioned and approved in several American cases. In *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, Chief Justice Parker, after referring to the cases of *Smith v. Bromley*, Doug. 670, and *Browning v. Morris*, 2 Cowp. 790, and to the distinction there taken, says: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of common law in this country." The case of *White v. Franklin Bank*, 22 Pick. 181, proceeds upon the same distinction. It is impossible, as it seems to me, to distinguish this case in principle from that now before the court. The revised statutes of Massachusetts, c. 36, sec. 57, prohibited banks from making any contract "for the payment of money at a future day certain,"

under a penalty of a forfeiture of their charter. The plaintiff had deposited money with the defendant in February, to remain until the tenth day of August; and the action was brought to recover this money. It was objected that the contract was illegal, and the parties *particeps criminis*, but the defense was overruled. This is by no means an anomalous case, as the counsel for the receiver upon the argument of this case seemed to suppose. On the contrary, it belongs clearly to the same class with the English cases just reviewed. Wilde, J., who delivered the opinion of the court, after referring to those cases, and quoting the remarks of Chief Justice Parker in *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, given above, says: "The principle is in every respect applicable to the present case, and is decisive. The prohibition is particularly leveled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, 'the statute itself, by the distinction it makes, has marked the criminal.' The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter."

Again, in the case of *Lowell v. Boston & Lowell R. R. Co.*, 23 Pick. 24 [34 Am. Dec. 33], where the objection was raised that the parties were *particeps criminis*, the same justice says: "In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." The same doctrine was reiterated in *Atlas Bank v. Nahant Bank*, 3 Met. 581. The principle of these cases was also adopted by our own supreme court, in the case of *Mount v. Waite*, 7 Johns. 434. The action was to recover back money which the plaintiffs had paid to the defendants for insuring lottery tickets, contrary to the policy of a statute passed in 1807. Kent, C. J., says: "The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract *malum in se*. I think, therefore, the maxim as to parties *in pari delicto* does not apply, for the plaintiffs were not *in delicto*."

This case is the last of the class to which I shall refer; and I think it would be difficult to find a series of cases, running through almost a century, more uniform and consistent in tone and principle and in the distinctions upon which they are based.

They have never, so far as I am aware, been overruled; and I know of no principle which would justify this court in disregarding them. The doctrine seems to me eminently reasonable and just, and I discover no principle of public policy to which it stands opposed. On the contrary, I concur in the sentiment which Judge Wilde, in *White v. Franklin Bank*, 22 Pick. 181, expresses, thus: "To decide that this action cannot be maintained would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank."

This language is as applicable to the case before us as to that in which it was used. It is said that all persons dealing with banks and other corporations are presumed to know the extent of their powers. This is no doubt technically true, and yet we cannot shut our eyes to the fact that in very many cases it is a mere legal fiction. If we take the present case as an example, it is plain that it would not have been easy for the Morris Canal and Banking Company, with the charter of the trust and banking company and the restraining act both before them, to determine whether the issue of these certificates in payment for state stocks would violate either; and yet, upon the doctrine here contended for, an honest mistake in this respect would visit upon the former company a forfeiture of the entire amount of stocks transferred, which the latter company, if disposed, might pocket. Such a principle would afford the strongest possible inducement for banks to transgress the law. All that they could get into their hands, by persuading others to take their unauthorized paper, would be theirs. Under such a rule, arguments to make it appear that they have power to do what they really have not might be made to constitute the most available portion of their capital; and unauthorized dealing in large amounts, with foreign states or corporations not familiar with our laws, the most profitable branch of their business. These considerations go, in my judgment, to strengthen and confirm the doctrine of the cases referred to, which hold that relief may be granted to the more innocent, when the parties are not *in pari delicto*.

The rule laid down in those cases for determining which is the more guilty party is directly applicable to the present case, so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, as was contended

by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation of sections 3, 6, and 7 of the act concerning unauthorized banking: 1 R. S. 712. It will be seen, by referring to those sections, that the penalties are imposed exclusively upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defense is based upon a violation of the restraining act, there is that statutory designation of the guilty party upon which most of the cases to which I have referred are made to rest. But it is obvious that the general principle, for which I contend, applies equally to that branch of the defense which rests upon the ground that the act of the banking company, in issuing the notes, was *ultra vires* and against public policy. The imposition of the penalties for a violation of the restraining law upon the corporation alone does not make it the guilty party, but it is simply evidence that the legislature so regarded it; and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy. Although persons dealing with corporations are, for certain purposes, presumed to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties. To me, therefore, it seems plain that whether we regard the act of the trust and banking company in issuing the certificates in question as a violation of the restraining law, or as simply *ultra vires*, or as against public policy, the corporation is to be regarded as comparatively the guilty party.

I wish here briefly to refer to another class of cases decided in this state, and known as the Utica insurance cases, not as authority for my conclusion, but by way of illustrating the distinctions to which I have adverted. The first of these is the *Utica Insurance Co. v. Scott*, 19 Johns. 1. The action was upon a promissory note discounted by the insurance company in the ordinary way of discounting by a bank. It was held that the insurance company had no power to discount notes, and that in so doing it had violated the restraining act. But the court say: "In analogy to the statute against gaming, the notes and securities are absolutely void, into whatever hands they may pass; but there is a material distinction between the security and the contract of lending. The lending of money is not declared to be void, and therefore whenever money has been lent it may be recovered, although the security itself is void." Judgment was, however, given for the defendant in that case, because the action

was brought upon the note alone. The next case was that of *Utica Insurance Co. v. Kip*, 8 Cow. 20. This also was an action upon a note discounted by the insurance company, but the declaration also contained a count for money lent. The plaintiff recovered; and the court say: "The illegal contract, if any, was not the loan, for the plaintiffs had a right to loan the money to the defendants; but it was the agreement to secure the loan by a note discounted. Avoiding what was illegal does not avoid what was lawful. The action for money lent is rather a disaffirmance of the illegal contract." Similar decisions were made in three subsequent cases, viz.: *Utica Ins. Co. v. Cadwell*, 3 Wend. 296; *Utica Ins. Co. v. Kip*, 3 Id. 369; and *Utica Ins. Co. v. Bloodgood*, 4 Id. 652.

These cases have never been overruled, and yet I think I may say they have generally been regarded with some suspicion as to their soundness. In *New Hope etc. Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648, Nelson, J., in speaking of them, says: "Whether the doctrine of these cases is well founded and may be upheld upon established principles or not, or whether the result was not ultimately influenced by the peculiar phraseology and powers of the charter of the Utica Insurance Company, in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect, I should have great difficulty in assenting to them." There is, undoubtedly, "great difficulty" in reconciling these cases with the settled rules in regard to illegal contracts; and the difficulty consists precisely in this, that the court, in the Utica insurance cases, have given to the guilty party the benefit of a principle which is only applicable to the more innocent. In the first case in which the insurance company recovered, viz., *Utica Ins. Co. v. Kip*, 3 Wend. 369, the court cite and rely upon the following passage from Comyn: "Where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that he should recover:" 2 Comyn on Cont., pt. 2, c. 4, art. 20. Comyn cites, as authority for this passage, the case of *Jaques v. Wilby*, 1 H. Black. 65, which is one of the cases to which I have referred, in which the plaintiff recovered on the ground that he was not *in pari delicto* with the defendant; and

on turning to that case it will be seen that the passage is copied *verbatim* from the argument of Sergeant Adair, counsel for the plaintiff. It is thus made apparent that the doctrine of the Utica insurance cases is built, in part at least, upon the principles and arguments which lie at the foundation of the class of cases just passed in review. More can scarcely be needed to justify the doubt which has been cast upon these insurance cases. How principles appropriately used to sustain a recovery against a party, upon the express ground that he is the party upon whom the prohibition and penalties of the law attach, can be made available to justify a recovery by a party so situated, is certainly difficult to comprehend.

But notwithstanding the misapplication to these cases of the principles for which I contend, the cases themselves afford strong evidence of the appreciation by the court of the soundness of those principles. Indeed, few, as it seems to me, will be found to deny either the justice or policy of the rule which refuses to permit the guilty party to retain the fruits of an illegal transaction at the expense of the more innocent. But were it otherwise, the rule, as I have shown, is indisputably established; and that the present case falls within that rule is entirely clear. We have next, then, to ascertain the relief to which the Morris Canal and Banking Company would, if the claimant upon the record, be entitled.

The illegal contract itself is of course void, and no part of it can be enforced. It is impossible, I think, to sustain the reasoning adopted in the Utica insurance cases, by which that part of the contract which embraces the loan (in this case the sale) was separated from the portion relating to the security, and upheld as a distinct and valid contract. The contract there, as here, was entire; and it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void. Recoveries are not had in such cases upon the basis of the express contract, which is tainted with illegality; but upon an implied contract, founded upon the moral obligation resting upon the defendant to account for the money or property received. The claim presented by the state of Indiana to the referees was in general terms, and broad enough to embrace a demand arising upon an implied contract to pay for the bonds transferred; and it has been repeatedly held that a corporation may become liable upon such a contract founded upon a moral obligation like that existing in this case: *Bank of Columbia v. Patterson*, 7 Cranch, 299;

Danforth v. Schoharie Turnpike Co., 12 Johns. 227; *Bank of U. S. v. Dandridge*, 12 Wheat. 64.

It follows from these principles that if the Morris Canal and Banking Company was the claimant upon the record it would be entitled to recover, not the specific balance due upon the certificates, nor the price-agreed to be paid for the stocks, but so much as the stocks transferred were reasonably worth at the time of such transfer, with interest, deducting therefrom whatever has been actually paid in any form by the North American Trust and Banking Company for the same, and leaving, however, the contract of sale, so far as it has been executed by payment, or its equivalent, undisturbed.

The only remaining question is whether the state of Indiana has succeeded to the rights of the Morris Canal and Banking Company in this respect. If, as it seems to have been held by the supreme court both at special and general terms, the canal and banking company acted in the sale of the stocks as the agent of the state of Indiana, then, of course, the latter, as the principal, is the proper party here. But aside from this, I cannot doubt that a court of equity would hold, upon the face of the transaction, that it was the intention of the Morris Canal and Banking Company to transfer to the state its entire claim against the trust and banking company, growing out of the sale of the stocks, and would, if necessary, compel any formal defects in such transfer to be supplied; and as the proceeding here is of an equitable nature, the court, upon well-settled principles, will regard what ought to be done as having been done.

The judgment of the supreme court should be modified in accordance with these principles, and the proceedings remitted.

MITCHELL, J., delivered an opinion in favor of affirming the judgment of the supreme court at general term. He was of the opinion that the evidence did not establish that the Morris Canal and Banking Company, or the state of Indiana, had knowledge, when the bonds were sold, that the trust and banking company purchased them for an illegal purpose, or with intent to make an illegal use of them; and that the last-named company, at the time of the purchase, in 1839, had authority to make and issue notes or certificates payable at a future day. He held that associations organized under the general banking law were not subject to the provision contained in the safety-fund act, Laws of 1829, 165, sec. 35, prohibiting moneyed corporations subject to the provisions of that act from issuing bills or notes payable on time; and that such associations might law-

fully issue such notes for a legitimate purpose, until prohibited by the act of 1840, Laws of 1843, 306, sec. 4.

DENIO, C. J., was also in favor of affirming the judgment, on substantially the same grounds as those stated by Judge MITCHELL

COMSTOCK, HUBBARD, T. A. JOHNSON, and WRIGHT, JJ., concurred in the foregoing opinion delivered by Judge SELDEN, and were in favor of modifying the judgment in accordance with the principles stated in that opinion.

A. S. JOHNSON, J., dissented.

Judgment modified.

ILLEGAL CONTRACTS, RIGHTS OF PARTIES TO: See *Buck v. Albee*, 62 Am. Dec. 564, and cases collected in the note thereto. To the point that where a contract is not *malum in se*, but merely *malum prohibitum*, and the parties are not equally guilty the less guilty may have relief, the principal case is cited and followed in *Commissioners v. Backus*, 29 How. Pr. 40; *Sistare v. Best*, 16 Hun, 615; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *City Bank v. Perkins*, 4 Bosw. 446; S. C., 29 N. Y. 554, 571; *Curtis v. Leavitt*, 15 Id. 45; *Sackett's Harbor Bank v. Codd*, 18 Id. 240-245; *Ganson v. Tift*, 71 Id. 57; and in other cases hereinafter mentioned. Thus a city issuing negotiable paper contrary to law has been held liable for money advanced thereon by an innocent holder: *Mayor v. Ray*, 19 Wall. 484. So where a bank issues paper which it is forbidden by law to issue, it is nevertheless liable for the consideration received therefor: *Curtis v. Leavitt*, 15 N. Y. 45; *Sackett's Harbor Bank v. Codd*, 18 Id. 244. Where the contract is merely in excess of corporate power, and is not immoral or opposed to public policy, the defense of *ultra vires* on the part of the corporation, where it has received the entire consideration, is not to be tolerated: *De Groff v. American Linen Thread Co.*, 21 Id. 128; see also *Gould v. Oneonta*, 3 Hun, 406; S. C., 6 Thomp. & C. 646. Mere knowledge by the vendor of liquors that they are intended to be sold by the vendee in violation of law will not prevent his recovering the price: *Webber v. Donnelly*, 33 Mich. 172. A broker instrumental in bringing parties together, who afterwards make a contract illegally to advertise a lottery, may recover his commissions, if he took no part in making or carrying out the contract: *Ormes v. Dauchy*, 13 Jones & S. 87. So where bills are borrowed to circulate as money in another state, contrary to its laws, but the lender does not stipulate for anything to be done in violation of such laws, he is not *in pari delicto*, and may enforce the contract of which the lending of such bills was a part: *City Bank v. Perkins*, 4 Bosw. 446; S. C., 29 N. Y. 554, 571. A carrier of smuggled goods doing nothing to facilitate the smuggling is not a *particeps criminis*, and may recover his freight, and is also liable for the loss of the goods: *Donovan v. Compagnie Generale Trans Atlantique*, 7 Jones & S. 521. But where a vendor sells an article with intent that it shall be illegally used, and does anything to further the illegal design, as by counterfeiting labels or the like, he cannot recover the price: *Materne v. Horwitz*, 18 Id. 45; *Hull v. Ruggles*, 56 N. Y. 428; *Knowlton v. Congress etc. Co.*, 57 Id. 532; *Arnott v. Pittston etc. Coal Co.*, 68 Id. 567. So where one leases a hotel bar and gives his lessee the right to sell

liquors under his license, contrary to law, an assignee of the lease having knowledge of the facts is *particeps criminis*, and cannot recover: *Sanderson v. Goodrich*, 46 Barb. 618. Where a contract is void as against public policy, both parties being *in pari delicto*, neither can have relief: *Martin v. Wade*, 37 Cal. 175; *Kerrison v. Kerrison*, 8 Abb. N. C. 449; *Saratoga County Bank v. King*, 44 N. Y. 91, 92; *Richardson v. Crandall*, 30 How. Pr. 144, citing the principal case.

Certainly the more blameworthy of two persons concerned in an illegal transaction can have no relief from the law, at least, so far as such relief depends upon affirmance of the transaction. Hence a bank lending money at a prohibited rate of interest on a note cannot recover against an indorser of the note: *Bank of Salina v. Alvord*, 31 N. Y. 476. Brown, J., in that case quotes with approval what is said by Selden, J., in the principal case, distinguishing between those cases in which relief is granted to a party to an illegal contract because he is not *in pari delicto*, and those in which relief is awarded on the ground of disaffirmance of the contract. In *Pratt v. Short*, 53 How. Pr. 511, S. C., 79 N. Y. 447, it is held, citing the principal case, that a bank discounting paper contrary to a provision in its charter may recover the money loaned as money had and received, though it cannot recover on the contract. But the contrary is held in *In re Jaycox*, 12 Blatchf. 215, S. C., 13 Nat. Bank. Reg. 127, quoting what is said in *Tracy v. Talmage*, as to the doubt thrown on the Utica Insurance Company cases by later decisions. The case is cited to the same point in *Pratt v. Eaton*, 18 Hun, 295, where it was held that the assignees of a bank discounting paper contrary to law could not enforce a mortgage given as security in such a transaction, but that decision was overruled in S. C., 79 N. Y. 450. In *Stewart v. National Union Bank*, 2 Abb. 433, it was held, citing and explaining the principal case, that a national bank having loaned money in excess of a statutory restriction could recover it back, or if not, that the court would not cancel the contract at the suit of a judgment creditor of the borrower, and compel the bank to relinquish securities received on it. In *Hurd v. Green*, 17 Hun, 335, it was decided that where a bank had taken a bond *ultra vires*, the obligor could not defend against it on that ground, citing *Tracy v. Talmage* to the point that the doctrine of *ultra vires* cannot be allowed to prevail either for or against a corporation where it would work a legal wrong. So a city loaning its bonds without lawful authority may, it seems, recover damages for their non-return: *Memphis v. Brown*, 20 Wall. 306, citing the principal case. The case is distinguished in *Haynes v. Rudd*, 17 Hun, 479, as affording no aid in the solution of the question in the case at bar, which was, whether or not one who had given a note to compound a felony, and had been compelled to pay it to a *bona fide* holder, could recover the money back from the original payee. The question was answered in the affirmative. In *Lafferty v. Jeley*, 22 Ind. 473, the principal case was cited upon the question, which was, however, left undecided, as to whether or not an attorney having made a champertous contract could rescind it and recover on a *quantum meruit* for his services.

THAT ASSIGNEE OF PRINCIPAL SUBJECT TAKES IT WITH ALL INCIDENTS, COLLATERALS, and rights attaching to it in the hands of the assignor, is a principle to which *Tracy v. Talmage* is cited in *McMahon v. Allen*, 35 N. Y. 407, S. C., 3 Abb. Pr., N. S., 79, 32 How. Pr. 331, where it was held that an assignee for the benefit of creditors could sue to set aside a prior assignment fraudulently procured from the assignor. The case is cited and applied as an authority for the same general doctrine, in *Freeman v. Auld*, 44 N. Y. 57; *Allen v. Brown*, Id. 233; and *Memphis v. Brown*. 20 Wall. 319.

SHELDON v. HUDSON RIVER R. R. Co.

[14 NEW YORK (4 KERNAN), 218.]

ACTION AGAINST RAILROAD COMPANY FOR SETTING BUILDING ON FIRE BY

SPARKS from a locomotive may be sustained (where direct evidence as to the cause of the fire is lacking) by proof that on other occasions engines of the company, in passing the spot, emitted sparks and coals which fell farther from the track than the building in question. Such evidence, even without connecting it with the particular engine supposed to have set the fire complained of, might suffice to cast the burden of showing that the fire was not set by the locomotives upon the company.

APPEAL from a judgment of nonsuit. The facts are stated in the opinion; and a report of the decision below may be found in 29 Barb. 226.

S. E. Lyon, for the appellant, the owner of the building destroyed.

John Thompson, for the respondents, the railroad company.

By Court, **DENIO, C. J.** The plaintiff owned and possessed a building used as a storehouse in Greenburgh, Westchester county, standing on the easterly side of the defendants' railroad, and about sixty-seven and one half feet from the track. It was in the charge of two of the plaintiff's servants. The outer doors were kept locked, and no fire was used in it. On the seventh of February, 1852, it took fire and was consumed; it was proved that about twenty-five minutes before the fire was discovered a train of cars of the defendants, drawn by a locomotive-engine called the *Oneida*, passed the place. On the first floor of the building there was a parcel of shavings and a quantity of lumber, and some of the glass in the windows of that story had been broken. As I understand the testimony, the place where the fire was first seen was on this floor, and not far from one of the windows. Having proved these facts, and that the day on which the fire took place was windy, the direction of the wind being towards the building, and the persons in charge having sworn that no person, to their knowledge, had been in it during that day, the plaintiff proposed to prove by a witness who lived close to the railroad, and about one fourth of a mile from the building, that shortly before it was burned he had seen sparks and fire thrown from the engines used by the defendants in running their trains through the witness's premises a greater distance than this building stood from the track of the railroad, and that he had picked up from the track, after the passage of the trains, lighted coals more than two inches in

length. The evidence was objected to by the defendants' counsel, and excluded by the court. The plaintiff's counsel excepted. The plaintiff also gave evidence which, as his counsel insists, tended to show that the engines used by the defendants lacked some apparatus which was in use upon some other locomotive engines, and which rendered the latter less liable to communicate fire to substances at the side of the road than those which were without that apparatus. The judge in the first instance denied a motion made by the defendants for a nonsuit, but after the defendants had proceeded at some length in the examination of witnesses in their behalf, he stopped the further examination of a witness and nonsuited the plaintiff.

It is argued by the defendants' counsel that the evidence offered and rejected was too remote and indefinite to have a just influence upon the particular question in issue in the case; that it did not refer to any particular engine, and that it may be that the one which ran past the plaintiff's premises, just before the discovery of the fire, was quite a different one from those which scattered fire on the occasion to which the evidence offered would apply. This argument is not without force; but, at the same time, I think it is met by the peculiar circumstances of this case. These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them that a stranger to the business cannot readily distinguish one from another. It will therefore generally happen that when the property of a person is set on fire by an engine, the owner, though he may be perfectly satisfied that it was caused by an engine, and may be able to show facts sufficiently legitimate to establish it, yet he may be utterly ignorant what particular engine, or even what particular train, did the mischief. It would be practically quite impossible by any inquiries to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashion of the engines and the character of the operation. I think, therefore, it is competent *prima facie* evidence for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the premises as to be likely to set on fire

objects not more remote than the property burned. It is presumed to be in the power of the company, which has intimate relations with all its engineers and conductors, to controvert the fact sworn to, if it is untrue, or, if true in a particular instance, that it was not so in respect to the engines which passed the place, at a proper time, before the occurrence of the fire. The effect of the evidence would only be to shift the *onus probandi* upon the company; and that, under the circumstances of this case, seems to me to be unavoidable. The rule respecting the *onus* often depends upon the special circumstances of the case, and it not unfrequently happens that a party is obliged to establish a negative proposition: *Phill. Ev.*, Cowen & Hill's Notes, 490, and cases. For instance, if it were proved to be universally true that the engines on the defendants' road scattered fire upon both sides, so as to endanger property as near the track as this building was, and it was established, as was done in this case, that the property claimed to have been set on fire by the negligence of the defendants was actually burned without any known cause or circumstance of suspicion besides the engines, it would clearly be incumbent on the defendants to show that they were not the cause. The present case is only less strong in degree. It was offered to be shown that a practice on the part of the company, which would have endangered this building, was indulged in about the time and near the place where the building was burned. That fact rendered it probable to a certain degree that the injury was attributable to that cause, but it left it in the power of the defendants not only to controvert the evidence generally, but to show that the special facts applicable directly to the occurrence of the fire were such as to overcome the general inference from the plaintiff's evidence, and avoid the presumption which that evidence created. I am of opinion, therefore, that the judge erred in this ruling.

The evidence excluded had a bearing upon both branches of the case which the plaintiff undertook to establish. It not only rendered it probable that the fire was communicated from the furnace of one of the defendant's engines, but it raised an inference, of some weight, that there was something unsuitable and improper in the construction or management of the engine which caused the fire.

It is unnecessary to express an opinion upon the case as it stood, without the evidence of which the plaintiff was deprived. It may be that when the case is tried upon the principle indi-

cated it will present no question, or a very different one from that which is now before us.

The judgment must be reversed, and there must be a new trial.

HUBBARD, J. The only question which I propose to consider is that relating to the exception to the exclusion of the evidence offered on the trial. This question is limited to the inquiry as to the competency of the proof, irrespective of its force or effect. It is not essential to determine the effect of the evidence upon the charge of negligence; it is enough if the same was competent for any purpose. I think it was competent for the purpose of showing that sparks might have escaped from the defendant's engine and been borne by the wind to a distance from the railroad track equal to that of the mill-house in question, thus showing a possibility, and in connection with other circumstances a probability, that the fire originated in the manner alleged in the complaint.

The theory on the trial was that the sparks or cinders causing the fire originated from the smoke-pipe or ash-pan of the engine Oneida attached to a train of passenger-cars which passed about twenty-five minutes before the fire was discovered. No other engine passing about that time, it may be assumed for the present purpose that if the defendants are responsible at all, the liability is chargeable to the Oneida as the offending engine. It was not proposed to show on the trial that sparks and cinders, capable of ignition, had been seen on other occasions to issue from the Oneida. Such evidence would have been clearly admissible, I think, from the necessity of the case. It generally or frequently happens, as may have been the fact in this case, that engine-sparks cause fires, without the sufferer being able to prove the fact by positive testimony. Circumstantial evidence must of necessity be resorted to, or injustice must be suffered, without redress, in very many instances.

The proof offered and rejected related to the emission of igneous matter by the defendants' engines generally, without designating any one in particular. This evidence, I think, was competent, and should have been received upon the proposition whether the defendants caused the fire. It was a primary fact to trace the fire to the defendants, as a ground of liability. There is no pretense in this case that the construction of the Oneida, as it respects the emission of sparks or cinders, differed from that of every other engine used by the defendants on their road.

It must follow, therefore, that under the same circumstances, the same amount of sparks and coals of fire would issue from every other engine as from the Oneida. The proof offered was, therefore, practically the same as though it had been proposed to show that the Oneida frequently or generally made emissions when running at the usual speed.

The competency of this evidence has been directly decided in the English court of common pleas: *Piggott v. Eastern Railway Co.*, 10 Jur. 571; *Aldridge v. Great Western R. R. Co.*, 15 Com. B., N. S., 583. These cases upon this point are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive-engines do emit sparks and cinders which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury.

There was evidence given on the trial relating to the question of negligence, but it need not be considered on this appeal. It may be observed, however, that the *gravamen* of the action is negligence. In the proof of it the same rule applies that does in the case of an injury to a passenger while riding in the cars: *Holbrook v. Ulica & S. R. R. Co.*, 12 N. Y. 236. Negligence involves the imputation of some wrongful or unauthorized act or omission of duty. It cannot be predicated upon an injury resulting from the performance of an act in itself lawful, and done in a proper manner. Such an injury is *damnum absque injuria*.

In my judgment, negligence cannot be inferred from the simple fact of causing the fire, for the reason that the use of fire to propel a railroad engine is lawful, and sparks and coals may escape, notwithstanding all safeguards which modern improvement has suggested may have been adopted: *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124 [38 Am. Dec. 64]. The general rule is, that a party is not responsible for the reasonable exercise of a right unless on proof of negligence, unskillfulness, or malice in the exercise of that right: *Phila. & Reading R. R. Co., v. Yeiser*, 8 Pa. St. 366; 2 Am. Railway Cases, 325. What is a reasonable exercise of a right must of course depend upon the facts of each particular case

The judgment must be reversed and a new trial granted, costs to abide the event.

A. S. JOHNSON, SELDEN, and MITCHELL, JJ., concurred

COMSTOCK, T. A. JOHNSON, and WRIGHT, JJ., dissented.

Judgment reversed.

LIABILITY OF RAILROAD COMPANY FOR FIRES CAUSED BY COALS OR SPARKS from its locomotives: See the note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 70, where this subject is discussed; see also *Hart v. Western R. R. Co.*, 46 Id. 719; *Baltimore etc. R. R. Co. v. Woodruff*, 59 Id. 72. To the point that negligence on the part of a railroad company is not to be presumed from the mere fact that adjacent property has been set on fire by sparks or coals from its engines, without any other evidence to show negligence, the principal case is cited in *Fero v. Buffalo etc. R. R. Co.*, 22 N. Y. 212, and *McCaig v. Erie R. Co.*, 8 Hun, 600. The case has also been often approved and followed on the point that in an action against a railroad company for such an injury, evidence to show that on previous occasions the company's locomotives dropped sparks or burning coals in passing over the same road, and that other fires have originated from them, is admissible, not only as tending to prove that the particular fire complained of was caused in that way, but also as tending to establish negligence: *Henry v. Southern etc. R. R. Co.*, 50 Cal. 184; *Gagg v. Vetter*, 41 Ind. 257; *Brusberg v. Milwaukee etc. R. R. Co.*, 55 Wis. 112; *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun, 184; *Webb v. Rome etc. R. R. Co.*, 3 Lans. 455; *Field v. New York etc. R. R. Co.*, 32 N. Y. 347, 349; *Crist v. Erie R. Co.*, 58 Id. 638. So proof is admissible of the direction in which the wind was blowing at the time the fire started: *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun, 185.

SAME PRINCIPLE IS APPLIED IN OTHER ANALOGOUS CASES. Thus, in an action for a fire alleged to have been caused by sparks from a steam-dredger or steam-mill, evidence that sparks from the same engine have on previous occasions been seen to fall on property equally distant, and to set fire thereto: *Hinds v. Barton*, 25 N. Y. 544, 546; *Hoyt v. Jeffers*, 30 Mich. 190, both citing the principal case. So in an action against a municipal corporation for an injury by slipping and falling on a defective sidewalk, evidence to show that on other occasions, while the sidewalk was in the same condition, other persons slipped and fell there in the same way, was held admissible to show that the sidewalk was, as tested by use, in fact unsafe: *Quinlan v. Utica*, 11 Hun, 217, 220, also citing the principal case.

OWENS v. MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH.

[14 NEW YORK (4 KERNAN), 380.]

INCORPORATION OF VOLUNTARY ASSOCIATION, AFTER DEATH OF TESTATOR, does not strengthen or impair its ability to take property given it by the will.

GIFT CANNOT BE SUSTAINED AS CHARITY, unless made upon a trust (either expressed or perhaps when clearly implied from name and purposes of a

charitable society to which it is made) that it shall be devoted to uses which the law recognizes as charitable.

HISTORY OF LAW OF CHARITABLE USES reviewed at length; and *held*, that to warrant a court of equity in sustaining a gift as made to a charitable use, it must be made to a trustee competent to take, and for a charitable use so far defined as to be capable of being specifically executed by authority of the court.

RESIDUARY LEGACY "TO THE METHODIST GENERAL AMERICAN MISSIONARY SOCIETY appointed to preach the gospel to the poor," a society not incorporated until after the testator's death, is invalid; and the next of kin are entitled to the residue as assets undisposed of. It cannot be sustained as a gift to the society for its own benefit for want of corporate power to take at the time when the gift should vest. It cannot be sustained as a gift to charitable use, because it does not name a trustee competent at the time, nor define a charitable use with sufficient distinctness to be judicially enforced.

APPEAL from a judgment reversing a surrogate's decree which sustained an indefinite bequest as charitable. The only question was upon the validity of a residuary devise "to the Methodist General American Missionary Society appointed to preach the gospel to the poor;" the society named having been a voluntary association until after the testator's death, when it became incorporated. The appeal was submitted.

E. L. Fancher, for the appellants

Dowe and Wright, for the respondents.

By Court, SELDEN, J. The surrogate found in this case that the voluntary association, now represented by the appellants, was the legatee to whom the bequest in the will of Owens was intended to be made; and the supreme court appears to have arrived at the same conclusion. The only question before this court, therefore, is, whether a bequest to such an association is valid. This question is not affected by the incorporation of the missionary society after the making of the will, and after the death of the testator: *Baptist Association v. Hart's Ex'rs*, 4 Wheat. 1; *Baptist Association v. Smith & Robertson*, 3 Pet. App. 481; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99. In view of these authorities, it is clear that, for all the purposes of this case, the question is precisely the same as if the appellants had remained unincorporated to the present time; and so it seems to have been regarded by the counsel as well as by the court below. If the bequest to the association while unincorporated was valid, there can, I apprehend, be no doubt of the right of the appellants to the legacy. The corporation is simply the association incorporated. The name is the same, and it is to be in-

ferred from the case that the original associates are the corporators. It is the same body, and possesses all its original rights, together with such rights and powers in addition as are conferred by its charter.

For the appellants, two points are made which are directly in conflict. It is insisted: 1. That the bequest to the missionary society is absolute, and not qualified or limited by any trust whatever; and 2. That it is valid as a charity. These two positions are inconsistent, and cannot stand together. Nothing is a charity in a legal sense, except that which is limited to some charitable use. But if this bequest is unaccompanied by any trust, the fund might be appropriated by the association to the establishment of a gaming-house, or any other immoral purpose, or it might be distributed among and be pocketed by the members. An absolute gift or bequest to an unincorporated missionary society is no more "a charity" than an absolute gift to an individual. In legal contemplation, "charity" and "charitable use" are convertible terms; and there can be no charitable use without a trust. To deny that this bequest was accompanied by a trust, therefore, is to deny that the law of charitable uses applies to the case; and this of course is to deny the validity of the bequest. Nothing is better settled than that a devise or bequest to an unincorporated association is, in general, void as well in equity as at law: *Co. Lit.* 95 a; *Shep. Touch.* 235; *Jackson v. Cory*, 8 Johns. 385; *Hornbeck v. Westbrook*, 9 Id. 73; *Baptist Association v. Hart's Ex'rs*, *supra*; *Greene v. Dennis*, 6 Conn. 293 [16 Am. Dec. 58]. It is only by virtue of that peculiar jurisdiction exercised by courts of equity, in regard to charitable uses, that such bequests have ever been sustained.

To uphold this bequest, therefore, it is indispensable to maintain that the missionary society, if successful in obtaining the fund in question, would be bound to appropriate it to some pious or charitable use. If, then, a bequest, unaccompanied by any designation of the purposes to which it is to be applied, be made to a society whose name and public acts indicate that its objects are religious or charitable, is there an implied trust which limits the use to such objects? Where the bequest is to a corporation, there would seem to be some basis for such an implication, because the objects, purposes, and powers of the corporation being in all cases more or less clearly defined by its charter, the bequest may fairly be presumed to have been intended for those specific objects. But we have no such criterion for ascertaining the nature and purposes of a voluntary associa-

tion. Those purposes may change with the will of the associates. They may be pious to-day and impious to-morrow. There is no law to prevent or restrain such changes. It is difficult to see, therefore, how a bequest to such an association can be deemed to create a "charitable use" unless the purpose to which it is to be devoted is pointed out by the testator.

It has nevertheless been held in several cases that a mere naked bequest to an unincorporated association is valid as a charity. In *Hornbeck's Ex'rs v. American Bible Society*, 2 Sandf. Ch. 133, a legacy, absolute in terms, to the New York State Colonization Society, a mere voluntary association, was held valid by Assistant Vice-Chancellor Sandford, under the law of charitable uses; and in the case of *Banks v. Phelan*, 4 Barb. 80, a legacy to the Roman Catholic church of Petersburg was sustained by the late Justice Edwards upon similar grounds, although the church was not incorporated, and although there was not a word in the will indicative of the use to which the fund should be applied. So in the case of *Executors of Burr v. Smith*, 7 Vt. 241 [29 Am. Dec. 154], the supreme court of Vermont, after a very elaborate argument and investigation, held legacies valid as charities which were given to the treasurers of the American Bible Society, the American Colonization Society, and the American Home Missionary Society, respectively, the societies being unincorporated. The legacies were given in each case, as expressed in the will, "for the use and purposes of the society," and there was no other express limitation of the uses to which the fund was to be applied.

In these cases the courts must have proceeded upon the ground that it was to be presumed that the testator intended the legacy to be used to promote the objects indicated by the names of the societies. In no other way could these bequests have been regarded as "charities," it being essential to a legal charity that there be a use and a trust. Without intending to express any opinion as to the correctness of these cases in this respect, I shall nevertheless assume, for the purposes of this case, that when a bequest is made to an unincorporated society, whose general objects are known to be, as its name indicates, religious or charitable, a trust is implied that the fund shall be devoted to those objects. With this assumption, can the bequest in this case be supported as a charity?

This question opens up an inquiry which is surrounded with difficulty. The law of charitable uses, as it has existed in England, may be ascertained with reasonable certainty; but how far

that law prevails in this state, and to what extent our courts have succeeded to the powers exercised in the English courts of equity on the subject, depends upon considerations which are necessarily obscure.

The jurisdiction of the court of chancery in England, in relation to charities, was derived from three sources: 1. From its ordinary jurisdiction over trusts; 2. From the prerogative of the crown; 3. From the statute of 43 Eliz., c. 4. It has never been seriously contended that the courts of this state possessed that portion of the jurisdiction which was derived from the statute of Elizabeth. This statute was embraced in the general repeal of English statutes in 1788, and there is not the slightest evidence that it had previously been adopted so as to become a part of the common law of the state. It is clear, therefore, that, so far as the law of charitable uses was derived from and dependent upon the statute of 43 Eliz., it is not in force here, and it seems equally clear that our courts are not endowed with any portion of the power which the chancellor of England exercises by virtue the royal prerogative, and as the personal representative of the crown. It follows that the jurisdiction possessed by the courts of this state over trusts for charitable purposes is limited to that which the court of chancery in England possessed independent of those two sources. This is the view which seems to have been taken of the subject by this court in the case of *Williams v. Williams*, 8 N. Y. 525.

Were it possible, then, to analyze at this day the jurisdiction of the English courts, and to ascertain the exact proportion of its separate parts, all doubts in regard to the jurisdiction of our own courts would be resolved. But the blending of the powers derived from these various sources in the same court, and their consequent indiscriminate exercise, has rendered this a difficult task. I think, however, that a careful attention to the history of the jurisdiction, and especially that part of it which is based upon the statute of Elizabeth, will enable us to determine with some degree of precision the relative importance of its different branches.

To comprehend this history fully, it will be necessary to recur to the origin of uses, and to some of the statutory enactments bearing upon them, "charitable uses" being the legitimate offspring of these enactments. The first invention by which the ecclesiastics of England sought to evade the statutes of mortmain, viz., common recoveries, having been defeated by the statute of Westminster 2, 13 Edw. I., c. 22, which provided that, not-

withstanding the defendant made default, it should still "be inquired of by the country whether the demandant had right," the next device was that of uses. As lands could not be conveyed directly to the ecclesiastical bodies themselves, they were procured to be conveyed to others to the use of such bodies, and by the aid of the court of chancery, which held the feoffees bound to execute such uses, the object of the ecclesiastics was accomplished. An attempt was made to meet this new device by the statute of 15 Rich. II., c. 5. But as this statute was only aimed at corporations and such bodies as had perpetual succession, there were many uses of a superstitious nature which were not within its provisions. It was not, therefore, until the statute of 23 Hen. VIII., c. 10, that this new invention of the clergy met with its final overthrow. That statute provided that all uses, etc., to the use of churches, chapels, church-wardens, guilds, companies, or brotherhoods, made of devotion, or by assent of the people, without any corporation, and also to the intents to have any continued service of a priest for threescore years, or other like uses, should be void.

The broad and comprehensive terms of this statute evince the hostility which uses, perverted as they had generally been to superstitious purposes, had excited. Its sweeping phraseology served not only to suppress all superstitious uses, but substituted many which were meritorious. It soon came to be seen that all uses were not superstitious. Accordingly, the statute of 1 Edw. VI., c. 14, called the statute of chauntries, speaks in the preamble of "good and godly uses, as in erecting of grammar schools to the education of youth in virtue and godliness, the further augmenting of the universities, and better provision for the poor and needy."

The term "charitable," as descriptive of a particular class of uses, appears to have had its origin subsequent to the latter act, and was used, in contradistinction to superstitious, to designate such good and worthy uses as were deemed not to be within the purview of the statute of Henry VIII. There is no evidence that this term was applied to such uses to distinguish them legally as a class until after the statute of 1 Edw. VI. Indeed, there is strong evidence that it was not; otherwise it would certainly have been resorted to in the preamble to that act, instead of the far less appropriate phrase "good and godly." This preamble was clearly the germ of the law of charitable uses; not that such uses did not exist before, but they had never been grouped together as a distinct class, and no peculiar principles had been

applied to them. The words "other like uses," in the statute of 23 Hen. VIII., c. 10, naturally gave rise to this classification. They were suggestive of a class of uses not "like" those intended to be condemned, and the statute of 1 Edw. VI. was the first attempt at a description of this class. From the date of this statute, if not before, it was strenuously maintained that the statute of 23 Hen. VIII. was aimed solely at superstitious uses, and that the uses mentioned in the preamble to the statute of 1 Edw. VI. were examples of an extensive class of exceptions. The term "charitable" soon came to be used as descriptive of this class. There appears, however, to be no reported case in which this doctrine was distinctly confirmed by the courts prior to *Porter's Case*, 1 Co. 16 a. This case deserves careful consideration, as throwing much light upon the law of charitable uses. It will be found to harmonize with and to be strikingly confirmatory of the view I have taken of the origin of such uses as a class.

The case was this: Nicholas Gibson, of London, had devised, in the reign of Henry VIII., all his lands and tenements to his wife, upon condition that she should, immediately upon his decease, by the advice of learned counsel, give, grant, and assure the same for the maintenance of a free school, and certain alms-men and alms-women forever. The widow, instead of executing the trust, made a lease for forty years, and the defendant Porter was in possession under this lease. The heir entered for breach of the condition and then conveyed to the queen, whereupon the attorney general filed an information in the court of exchequer in behalf of the queen to recover possession. The case was argued by Sir Thomas Egerton, afterwards Lord Ellesmere, and by Sir Edward Coke for the queen. The defendant's counsel insisted that the condition was void under the statute of 23 Hen. VIII., c. 10, for the following, among other reasons: because "the statute saith 'such uses, and all other like uses, intents,' etc., shall be void." To which the counsel for the queen replied that the case was not within the intent of the act of 23 Hen. VIII., "because it was not the intention of the said act to extend to such good and charitable uses as the uses in our case are;" and again, after referring to various other statutes made to suppress certain superstitious uses, they say: "But by none of these acts 'good and charitable' (as the uses in our case) are taken away, abolished, or made void, but rather by the act of 1 Edw. VI. they are intended to be maintained, as appeareth by the preamble thereof, viz.: 'For

the education of youth in virtue and piety at grammar schools, for the further augmentation of the universities, and the better provision of the poor and needy,' which, by the said act of 1 Edw. VI. are called good and godly uses; and therefore it shall not be intended that such good and godly uses were made void by the statute of 23 Hen. VIII." The court held "that the statute of 23 Hen. VIII. did not extend to take away the good and charitable uses in the case at bar," and gave judgment for the queen. Lord Coke adds: "And the same day judgment was given in the king's bench, in the like case upon the said statute of 23 Hen. VIII." This case shows that the term "charitable" was used at this time to designate a class of uses excepted from that statute. It will be seen, too, that the learned counsel for the queen based their argument for the exception, not upon any classification of uses as charitable prior to the statute of Henry VIII., but upon the inference to be drawn from the preamble to the statute of 1 Edw. VI., c. 14; and also that they argue it as an original question, and do not even allude to any judicial authority for their position.

It would be difficult, I think, to maintain, in the face of such an argument from two such men as Egerton and Coke, that the law of charitable uses, as it afterwards existed, had obtained at that time any substantial foothold in the law of England. But this is not all. The reference by Coke, in the conclusion of his report of *Porter's Case*, 1 Co. 16 a, to a judgment of the court of king's bench, pronounced on "the same day," and in "the like case," is very significant. The case referred to by Coke is that of *Martidale v. Martin*, Cro. Eliz. 288, more fully reported by Popham under the name of *Gibbons v. Maltyard*, Poph. 6. There Sir Richard Fulmston had devised certain lands to his executors in trust, to be appropriated to the permanent maintenance of a preacher "to preach the word of God in the church of St. Mary, in Thetford, four times in the year, and to have for his labor ten shillings for every sermon," and to the establishment of a free school. The executors neglected the trust, and the heir entered for condition broken, whereupon the lessee of the executors brought ejectment. The first point taken by the defendants was, that the use was made void by the statute of 23 Hen. VIII, c. 10. As to this, Popham says: "But it was, after often argument, agreed by all the court that the first exception was to no purpose, for they conceived that this statute was to be taken to extend only to the uses which tend to superstition," etc. Now the fact that the judgment of the king's bench in this, and of the

exchequer in *Porter's Case, supra*, were rendered on the same day, and that, too, after repeated argument in the king's bench, raises a probability that the decision was the result of an interchange of views between the courts; and this probability is increased by the circumstances that Sir John Popham, who was chief justice of the king's bench at the time the decision was made, was attorney general when *Porter's Case, supra*, was commenced, and himself filed the information in that case.

We have here, then, a combination of the most eminent legal talent in England, including the justices of the king's bench, the barons of the exchequer, the attorney and solicitor general, repeatedly arguing and gravely considering whether there was at that time any such thing as a valid charitable use in England, except those enumerated in the preamble to the statute of 1 Edw. VI., c. 14. It was held that there was, and what was the ground? Not that charitable uses were known and recognized as a distinct class prior to the statute of 23 Hen. VIII., but, as stated by Popham, it was that at the time of that statute "they began to have respect to the ruin of the authority of the pope," etc. This also is the argument used in *Porter's Case, supra*. The queen's counsel, speaking of the statute of Henry VIII., then say: "*Distinguenda sunt tempora*, and the time when this was made is to be considered. . . . Before that time divers superstitions and errors in the Christian religion, which had a pretense and semblance of charity and devotion, were discovered by the light of God's word; therefore, to take away such superstitious uses, as to pray for souls supposed to be in purgatory, and the like, that statute was made, and not to prohibit the erecting of grammar schools and relief for poor men."

It is not claimed that these cases prove that there was no such thing as charity in England previous to the statute of 23 Hen. VIII., nor that there were no uses created for charitable purposes which were upheld and sustained by the courts. But they do prove that such uses had not, prior to that statute, been grouped together as a distinct class and made the subject of a separate and peculiar jurisdiction. It is clear that this statute gave rise to that grouping, by first rendering it necessary to distinguish between such uses and those which were superstitious. The question to be determined is not, When did charity begin in England? but, What was the origin of that peculiar code administered by the court of chancery under the name of "the law of charitable uses"? and I maintain that the two cases here referred to conclusively show that there were no traces of that code in the law at that time.

But we have not yet exhausted the light shed by *Porter's Case*, *supra*, upon this obscure subject. Lord Loughborough, speaking of this case, in *Attorney General v. Bowyer*, 3 Ves. 714, says: "*Porter's Case* was upon a devise before the statute of wills, and consequently before the statute of 43 Eliz. It does not appear that this court, at that period, had cognizance, upon information, for the establishment of charities. Prior to the time of Lord Ellesmere, as far as the tradition in times immediately following goes, there were no such informations as this upon which I am now sitting, but they made out the case as well as they could at law." *Porter's Case* itself affords strong circumstantial evidence of the truth of this remark. That was an instance of a charitable use of the most favored kind, as the law was afterwards understood; and what was the course pursued by the most eminent counsel in England to enforce it? The first step taken was an entry by the heir for condition broken; the next, a conveyance by the heir to the queen; and the third, an information by the attorney general, not in the court of chancery to establish the use, but in the court of exchequer to recover possession. That all this was done by the advice of Sir John Popham, who was then attorney general, is evident, because the entry by the heir was on the twenty-fourth of January, the conveyance to the queen on the twenty-fifth, and the filing of the information on the third of February, six days afterwards; and that the object of the whole was to secure the execution of the trust is proved by the subsequent argument in the case. Would Sir John Popham, attorney general, and one of the ablest lawyers in England, have resorted to this indirect and circuitous mode of establishing the use if he had supposed it could be done by a direct proceeding in chancery? The information in the exchequer was a proceeding at law in the nature of an ejectment.

The course pursued in this case, as well as that upon the will of Sir Richard Fulmuston, go strongly, and almost conclusively, to show that information in chancery by the attorney general in such cases were not then known; and this is still further confirmed by the result of the researches of the record commissioners of England, who, as I understand their report, did not discover a single instance of the filing of such information prior to the time of which we are speaking.

There is still another case with which Lord Ellesmere was connected, and which, as it possesses some extraordinary features, is worthy of notice here; it is not found in any volume of reports, but is elaborately reported in the preamble to the

statute of 4 James I., c. 7. Hugh Westwood, of Chedworth, in the county of Gloucester, had devised certain premises, consisting of a rectory, parsonage, advowson, etc., to Lord Charedes and a number of other devisees, in trust, to found and maintain a free grammar school in the town of Northleech, giving the nomination of the school-master to the heirs of the devisor, and the determination of all doubts that might arise upon the will to the justices of assize. The inhabitants of Northleech, pursuant to the will, bought a house and lot for the school, and employed a school-master; but the devisees having all died except one, the survivor, Thomas Apparye, conveyed the premises to his sons, in fraud of the trust; and the heir of Westwood also entered, claiming that the trust was void. The inhabitants and the school-master then jointly filed a bill in chancery, and the lord chancellor, Sir Christopher Hatton, referred the case to the justices of assize, pursuant to the will, who reported that the school should be incorporated, and the premises then conveyed to the school-master and his successors; and an order was made by the chancellor in accordance with this report. Afterwards a decree to the same effect was obtained from Sir John Pickering, lord-keeper of the great seal, and still later this decree was confirmed by Sir Thomas Egerton, who succeeded Sir John as lord-keeper. The statute of James incorporates the school by the name of "the school-master and usher of the free grammar school of Hugh Westwood, esq., of the town of Northleech," and provides that the corporation "shall have, hold, and enjoy the premises, the statute of mortmain or any other law or statute to the contrary in any wise notwithstanding." It also provides for the payment to William Westwood, the heir of the devisor, of one hundred and sixty pounds for the surrender of his rights in the premises, and for an annuity of thirty pounds a year for life to Eustace Apparye, "in consideration of his yielding up of his said lease and conveyance of the said parsonage and premises."

There could be no stronger proof that the peculiar law of charitable uses, as afterwards understood, was at that time unknown in England than is afforded by this case. If that law had prevailed, the remedy would have been simple. An information in chancery, in the name of the attorney general, would speedily have forced the devisees or their heirs to found the grammar school pursuant to the will. Instead of this, a somewhat incongruous suit is commenced in the joint names of the inhabitants of Northleech and the school-master; and although the

lord chancellor made a decree in the case, which for some reason it was found necessary to have confirmed, first by Lord-Keeper Sir John Pickering, and afterwards by Sir Thomas Egerton, who became lord-keeper in 1596, 39 Eliz., yet the powers of all these high officers seem not to have been successful in establishing this grammar school until 1606, ten years afterwards; and then only by first compromising with all the claimants, and then procuring an incorporation in the names of the school-master and usher, and vesting the title in them by direct act of parliament. Precisely what the obstacle was which prevented for so long a time the establishment of this use does not appear. It may have been the want of a proper party to prosecute the suit; that is, to represent the only real beneficiary, the public.

These three cases, viz., *Porter's Case*, 1 Co. 16 a, that upon the will of Sir Richard Fulmuston, and that of the free grammar school of Northleech, all occurring at the same precise period, seem to have roused the attention of the English people, and to have stimulated to a rapid growth the law of charitable uses; the seeds of which, planted in the statute of 23 Hen. VIII., had already taken root in that of 1 Edw. VI., c. 14. Informations in the name of the attorney general, and the statutes of 39 & 43 Eliz., were the first indications of this growth.

Passing over the statute of 39 Eliz., which it is unnecessary particularly to notice, I come to that of 43 Eliz., which has given rise to so much conflict of opinion both in England and in this country, one class of jurists tracing the law of "charitable uses" mainly to this statute, and the other insisting that it was merely designed to provide a new mode of enforcing such uses, but added nothing to the power of the court over them.

To appreciate fully the motives which led to the passage of this act, as well as to the proceeding by information in the name of the attorney general, it is necessary to notice one or two distinctions not yet particularly adverted to. In the first place, we must distinguish charity in a legal sense from acts of mere liberality or benevolence. To constitute a "charity," the use must be public in its nature. A trust created for the use of a single individual or of a family is not a charity. In the case of *Ommanney v. Butcher*, 1 Turn. & R. 260, the master of the rolls says: "It is competent to a testator to direct his executors to give to his poor relations; that is not a charity, but it is a trust to give to poor relations." Again, he says: "There is no

case in which private charity has been made the subject of disposal in the crown, or been acted upon by this court. The charities recognized by this court are public in their nature."

Another distinction is, between those cases where the use is for a corporation or some recognized public body capable of bringing a suit, and cases where no beneficiary competent to come into court as a party is designated. There is no doubt that where the beneficiary of the use for which a trust was created for any of the purposes enumerated in the statute of Elizabeth was a corporation, as a college, an incorporated hospital, school, or the like, the court of chancery had jurisdiction prior to either of the statutes of Elizabeth to enforce the use upon an original bill in the name of the corporation; and as such trusts were afterwards recognized as "charities" to this extent, it may be justly said that the court of chancery had an inherent jurisdiction over charitable uses prior to and independent of that act.

It is equally plain that where no beneficiary competent to sue was named, as where the trust was created in general terms, as to establish or found a public school, an asylum for the poor, or the like, without designating any particular persons or body of persons to be benefited, there was no legal means, whatever, prior to the statutes of Elizabeth and to the use of informations in the name of the attorney general, of enforcing the execution of the use. Although such uses were held good by the courts in proceedings in behalf of the crown, under the statute of 1 Edw. VI., c. 14, for a forfeiture of the property, *Adams and Lumbert's Case*, 4 Co. 104, so that the right of the trustee to the property was recognized; yet there was no legal mode in which such trustee could be compelled to perform the trust, because no party would exist competent to bring a suit for that purpose. Even in cases where the particular locality or town to be benefited by the use was named, although suits had been sometimes brought and sustained in the name of "the inhabitants" of such town, or in the name of several individuals in behalf of themselves and all others interested in the use, yet the history of the case of the free grammar school of Northleech suggests a doubt whether this practice was not attended with serious difficulty. We see, therefore, the imperious necessity which existed for some new mode of proceeding, by which public uses of this general nature could be enforced, as well as the reasons for the peculiar kind of tribunal created by the statute of 39 & 43 Eliz. The proceedings before the commissioners were not

in the form of a suit *inter partes*; but the commissioners were to inquire "as well by the oaths of twelve men or more of the county, as by all other good and lawful ways and means." They could proceed, therefore, upon such information as they could obtain, and were not governed by any technical rules. One principal object of the statute manifestly was to avoid this difficulty as to parties.

Informations in the name of the attorney general were another device to meet the same difficulty. The uses to be enforced being public in their nature, these informations brought the real beneficiary, the king in his character of *parens patriæ*, before the court, through his legal representative, the attorney general. This remedy was entirely independent of the statute of Elizabeth, being based solely upon the ordinary judicial power of the court combined with the prerogative of the crown, and was so apt and appropriate that it is a matter of surprise that it had not been sooner resorted to.

But the providing of a remedy for a class of uses which could not be enforced by any existing form of proceeding, although the principle was nevertheless not the sole motive for the enactment of the statute of 43 Eliz. It had two other objects. One was to specify the uses excepted out of the statute of 23 Hen. VIII., c. 10, being the uses called "good and godly" in the preamble to the statute of 1 Edw. VI., but afterwards more appropriately termed "charitable." The other was to relieve this favored class of trusts from the operation of some of the stringent rules of the common law. To prove the first of these objects, more can hardly be needed than to glance at the statute of Henry VIII., with its sweeping condemnation of uses in general; then at the preamble to the statute of 1 Edw. VI., with its imperfect specification of charitable uses, and finally at the embarrassment which must have been created by the want of such a specification. It was evidently, in part, to meet the difficulty of determining what uses were to be deemed charitable, as distinguished from superstitious, that the statute of Elizabeth was passed.

But I have said that another object was to exempt charities from some of the more rigid of the common-law rules applicable to trusts. This is, I think, plainly to be inferred: 1. From the language of the statute itself. Its phraseology is peculiar: "Whereas, lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, etc., have been heretofore given, limited, appointed, and assigned," etc. Why were these words,

"limited, appointed," etc., used instead of the ordinary words, "granted, devised, bequeathed," etc.? This could not have been accidental, because the statute was drawn by Sir Francis Moore, to whom the duty was specially assigned by parliament: Duke on Charitable Uses, by Bridgman, 122, note. Now, an eminent lawyer like Sir Francis would never have departed so widely from the ordinary legal language without an object; and the only conceivable object is to uphold certain uses which, by the established rules applicable to grants, devises, bequests, etc., would be void. But, 2. That this was one of its objects, if not apparent upon the face of the statute, is most abundantly shown by the construction put upon it by the courts, and by the uniform practice under it. The first case to which I will refer to show the force given to the words "limited and appointed," is that of *Jesus College*, or *Flood's Case*, Hob. 136; Duke on Charitable Uses, 78. In 25 Eliz., one Griffith Flood had devised certain lands first to his wife for life, then to his daughter for life, and afterwards to the principal, fellows, and scholars of Jesus College, in Oxford. The estates for life being ended, the heir of Griffith Flood entered. A case was then made, which was referred to Chief Baron Tanfield and Lord Hobart; and the latter reports their decision as follows: "We agreed that the devise was void in law, because the statute of wills did not allow devises to corporations in mortmain; but yet we hold it clearly within the relief of the statute of charitable uses, 43 Eliz., under the words 'limited and appointed.'" This case was decided only fifteen years after the statute of Elizabeth was passed. Two years later, *Collison's Case*, called in Duke *Rolt's Case*, arose before Lord-Keeper Bacon: Hob. 136; Duke, 73. Collison, in the 15 Hen. VIII., had devised a house to his wife for life, and then to feoffees, in trust, to keep it in repair, and "to bestow the rest of the profits upon the reparation of certain highways." The case was between the parishoners and Rolt, who claimed as heir, and was referred, like the last case, to Lord Hobart and the chief baron. Hobart reports their decision thus: "And we resolved clearly that it was within relief of the statute of 43 Eliz. For though the devise were utterly void, yet it was within the words 'limited and appointed to charitable uses.'" The objection to the devise is not stated in Hobart, but Duke shows that it was that the devise was made before the statute of wills. In 1622, five years after *Collison's Case*, *Stoddard's Case* was decided in chancery. Stoddard had bequeathed by parol a yearly rent of ten pounds, out of his

house called the Swan, with one hundred marks, in the Old Jewry, London, for the maintenance of two scholars in Oxford and Cambridge; and directed one Hugh, a scrivener, to reduce it to writing, which was done. The will was held good. Duke says: "For although by law a rent cannot be created without deed or will in writing, yet this nuncupative will was good to create the rent to a charitable use, by the words of the statute, 'a limitation or appointment;' for although it be not a good gift, yet it is a good limitation or appointment:" Duke, 81. A few years later the case of *Platt v. St. John's College*, came before Lord-Keeper Coventry: Cas. in Ch. 367; Duke, 77. The ancestor of Platt had devised his lands to the college by a wrong name, "but the lord-keeper decreed it a good appointment for a charitable use, within the statute of 43 Eliz., although before the statute no such decree could have been made." These four cases, decided upon the heel of the statute of Elizabeth, conclusively prove that whatever may have been the object of the statute, its effect, as construed by the courts, was to cure all defects in gifts to charitable uses, whether such defects depended upon the rules of the common law or upon positive statutory provisions.

But there are several cases which expressly declare that such was its object and intent. In the case of *Christ's Hospital v. Harex*, Duke, 84, which arose in 1620, a tenant in socage had devised all his lands to a hospital, although by the statutes of 32 & 34 Hen. VIII. he was authorized to devise only two thirds. It was insisted that this was good for the whole land as a limitation and appointment under the 43 Eliz., on the ground that the object of that statute was to supply all defects in assurances for charitable uses; and according to Duke, the lords commissioners, keepers of the great seal, would have so held, but the parties agreed. Again, in *Attorney General v. Roge*, 2 Vern. 453, before Lord-Keeper Wright, in 1703, a tenant in tail had devised lands for the support of a school-master and other charitable uses. The question was whether such a devise was good without fine or recovery; and the lord-keeper held that "the intent of the statute of Elizabeth being to make the disposition of the party as free as his mind, and not to oblige him to the observance of any legal forms, the devise was good."

It is plain from these cases, as well as from the whole series of subsequent cases on the subject, that the law of charitable uses, as afterwards administered, derived much of that peculiar force by which it was made to supersede most of the technical

rules of the common law applicable to trusts, as well as many positive statutes, from the construction thus given to the words "limited and appointed" in the statute of Elizabeth. This, however, was not the only source of the peculiar features of that law. As we have seen, the same causes which produced the statute of Elizabeth led also to the practice of filing informations in chancery in the name of the attorney general, and with these informations was introduced into the administration of charities some portion of the royal prerogative which contributed, in combination with the broad construction given to the statute, to produce the charitable code of England. It seems to me clear that all that is distinctive and peculiar in the law of charities is to be traced to one or the other of these sources.

Although, as before remarked, there was a class of charitable uses of which the court of chancery took cognizance upon original bill prior to the statute, that is, uses created for the benefit of corporations or of recognized public bodies, such as towns, yet the jurisdiction exercised in such cases, so far as we have any authentic evidence on the subject, was simply the ordinary jurisdiction of the court over trusts. It does not appear from any record of those cases which has come down to us that the court ever assumed, prior to the statute of Elizabeth, any of those extraordinary powers in respect to charities which it so liberally exercised afterwards; and when to this negative proof is added the fact that in all the early cases the judges uniformly referred to the words "limited and appointed" in the statute as the authority for their decisions, little doubt, as it seems to me, can remain that we are to look to the statute as the principal source of this peculiar jurisdiction. This conclusion is still further strengthened by the fact that since the statute of Elizabeth no uses have been regarded as "charitable," in a legal sense, except those which were within the letter or spirit of the statute. Judge Story says: "It is very certain, also, that since the statute of Elizabeth no bequests are deemed within the authority of chancery, and capable of being established and regulated thereby as charities, except bequests for the purposes which that statute enumerates as charitable, or which by analogy are deemed within its spirit and intendment:" 2 Story's Eq. Jur., sec. 1155. I shall cite but a single case to show the truth of this remark, as the point admits of no dispute. In *Morice v. Bishop of Durham*, 9 Ves. 399, the master of the rolls, Sir William Grant, says: "Is this a trust for charity? Do purposes of liberality and benevo-

lence mean the same as 'objects of charity'? That word, in its widest sense, denotes all the good affections men ought to bear to each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this court. Here its signification is derived chiefly from the statute of Elizabeth. Those purposes are considered charitable which that statute enumerates, or which by analogy are deemed within its spirit and intendment." In the same case, which afterwards came before the chancellor upon appeal, 10 Ves. 522, Lord Eldon says: "Looking back to the history of the law upon this subject, I say, with the master of the rolls, that a case has not yet been decided in which the court has executed a charitable purpose unless the will contains that which the law acknowledges to be a charitable purpose." It is plain that by the word "law," as here used, the chancellor meant the statute of Elizabeth. Again he says, speaking of that statute: "I believe the expression 'charitable purposes,' as used in this court, has been applied to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is, by the statute, given to all the purposes described."

Now, there were many other uses for benevolent purposes which, independently of the statute, would have commended themselves to the favor of the court as strongly as those enumerated in it. If, then, the peculiar law of charities existed at common law prior to the statute, how did it happen that it was confined in its application to the particular uses there specified? This restriction is perfectly in accordance with the supposition that the law was founded upon the statute, but somewhat difficult of explanation upon any other theory.

In my reference to authorities I have confined myself mainly to those which were either contemporary with the statute of Elizabeth, or immediately prior or subsequent thereto, because I hold it to be clear that Lord Ellesmere, Sir Edward Coke, Sir John Popham, and other eminent lawyers of that period must have better understood the state of the law in their own times, and the effect and object of a statute just then passed, than any lawyers, however distinguished, who lived a century and a half afterwards. The language of Lord Hardwicke in *Corporation of Barford v. Lenthall*, 2 Atk. 551, shows how liable we are to be misled by the modern cases. He says: "The courts have mixed the jurisdiction of bringing information in the name of the attorney general with the jurisdiction given them under the

statute, and proceed either way, according to their discretion." It is entirely hopeless, therefore, to attempt to ascertain the extent of the original jurisdiction of the court, unless attention is principally confined to a period anterior to this commingling of jurisdictions. For similar reasons, I have omitted to refer to the American cases, which are in conflict with each other. To ascertain the nature of charitable uses, we must look to the records, in which alone the origin and history of those uses are to be found.

It follows from this reasoning that, in determining the extent of the jurisdiction of the courts of this state over charitable trusts, we are to look to the jurisdiction exercised by the court of chancery in England over trusts in general. It having been held by this court in the case of *Williams v. Williams*, 8 N. Y. 525, that trusts for religious and charitable purposes are not within our statute of uses and trusts, or that concerning the creation of perpetuities, we are without any restrictions upon this class of trusts, except those which are derived from the rules and principles of the common law. We are to look, therefore, to those principles to determine the validity of this devise. As charitable uses, like all other uses, comprise a trust as well as a use, it is obvious that they are liable at common law to two classes of defects; one affecting the trust, and the other the use. To constitute a valid use, there must be, in all cases: 1. A trustee legally competent to take and hold the property; and 2. A use for some purpose clearly defined.

Now, if it be admitted that the court of chancery in England, in its anxiety to support uses deemed specially meritorious, had, independently of the statute of Elizabeth, somewhat relaxed the rigid rules of the common law in regard to the certainty required in the specification of the use, there is still no evidence that it ever assumed to dispense with that rule which required that there should in all cases be a competent trustee of the fund.

It is true that where trustees capable of taking the legal estate were originally appointed, so that a valid use was in the first instance raised, and the case was thus brought within the jurisdiction of the court of chancery, that court would not afterwards suffer the use to fail, but would supply any defect which might arise in consequence of the death or disability of the trustees by appointing new trustees in their place; but when no competent trustees were in the first instance appointed, so that

no legal estate ever vested, of course no use was raised, and the court of chancery acquired no jurisdiction of the case.

The want of a competent trustee is precisely that which distinguishes this case from that of *Williams v. Williams*, 8 N. Y. 525, decided by this court. In that case, the disputed legacies were given to the trustees of an incorporated society, and to three individuals by name. This circumstance is referred to and relied upon by the court. Denio, J., says: "There is here a good trustee to take the funds in the first instance; and a succession of trustees may be provided by the court, by new appointment as often as circumstances may require. The trust is for the education of the children of the poor, at a particular institution of learning, which I presume to be an incorporated academy, and a rule of ready application is given for selecting the objects of the testator's bounty." No inference can be drawn from the decision in that case that the court would have supported the legacy if given to a voluntary unincorporated society.

We have one direct authority occurring just about the time when the statute of Elizabeth was passed, showing that a charitable devise to persons unincorporated could not then be sustained. I refer to the case of *Mayor etc. of Reading v. Lane*, Duke on Charitable Uses, 81. There a devise was made to "the poor people maintained in the hospital of St. Lawrence, in Reading, forever." No designation of any unincorporated body could be more definite than this; and yet it was conceded that they could not take. The devise, however, was sustained as a good devise to the mayor and burgesses who were a corporation, and authorized to take lands in mortmain.

There is little in the history of charitable uses in England to encourage the courts of this country in violating the ordinary rules of law in their efforts to sustain a particular class of trusts. All partial legislation and strained judicial construction in favor of particular interests tend to disturb that social equality which general and uniform laws, operating in connection with the natural impulses of men, are calculated to produce. Thus the law of charitable uses in England found its appropriate *finale* in the statute of 9 Geo. II., c. 36, which cut off all such uses, if charged in any way upon lands, unless created by deed, twelve months before the death of the donor. The preamble to that statute is as follows: "Whereas gifts or alienations of land, tenements, or hereditaments in mortmain are prohibited or

restrained by Magna Charta and divers other wholesome laws as prejudicial to and against the common utility, nevertheless this public mischief has of late greatly increased, by means of large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs: for remedy whereof be it enacted," etc.

We may look for legislation of the same stringent character here, if our courts follow the example of the English chancellors in applying a peculiar and partial system of rules to the support of charitable gifts. My convictions are decidedly against both the policy and legality of such a course; and I am constrained, therefore, to hold that a devise to an unincorporated missionary society is void.

To avoid misapprehension, it may be proper to add, that nothing which has been said is intended to deny the power of courts of equity in this state to enforce the execution of trusts created for public and charitable purposes, in cases where the fund is given to a trustee competent to take, and where the charitable use is so far defined as to be capable of being specifically executed by the authority of the court, even although no certain beneficiary other than the public at large may be designated. For example, devises or bequests to trustees for the purpose of founding a public library, a school, a hospital, or the like, create legal and valid trusts. This is precisely the class of trusts, as already shown, which gave rise both to informations in chancery, in the name of the attorney general, and to the statute of 43 Eliz. The remedy afforded by the statute has no application in this state; but the remedy by information, so far as it was a common-law remedy, is as available here as in England, although it must undoubtedly be modified so as to conform to our different modes of proceeding. Informations have been said to be a prerogative remedy, and it is true that the jurisdiction exercised upon them was in some degree strengthened and extended by a resort to the royal prerogative; but it is nevertheless plain that such informations were the natural result of the application of common-law principles and forms of proceeding to those particular cases, and that they could be and were sustained independently of prerogative. Here this remedy must assume the form of an ordinary suit in the name of the attorney general, or perhaps of the people of the state, and would be limited in its scope by the principles of the common law. I see

no reason why, to this extent, it may not be administered by our courts.

The judgment of the supreme court in this case should be affirmed.

DENIO, C. J. Assuming that the unincorporated society which existed at the time of the execution of the will in question, and which was subsequently incorporated, is sufficiently pointed out by the description in the will to enable us to say that it is the body intended by the testator, it becomes necessary to inquire whether the trust is one which can be executed by the court as a charitable use. The testator is presumed to have intended to appropriate the fund for the advancement of the objects which the society was formed to promote. It is shown that the corporation, which is the appellant in this case, is identical in its purposes with the voluntary association which was absorbed by the act of incorporation. These purposes, as expressed in the act of incorporation, are "to diffuse more generally the blessings of education, civilization, and Christianity throughout the United States and elsewhere." Trusts in favor of education and religion have always been considered charitable uses. They are expressly mentioned in the statute of 43 Eliz., which, in regard to the definition of charities, was declaratory of the common law. But the advancement of civilization generally is not classed among charities in the statute, and I have not been able to find an adjudged case in which it has been held to fall within the legal notion of charity. The term undoubtedly includes instruction in learning and the arts, but it embraces much more. It includes all those improvements in individual, social, and political life which tend to meliorate the condition of men. A more general term could scarcely be chosen. In cases where there is a trust annexed to a bequest, but it is not such a trust as the court can execute as a charitable gift, the beneficial interest belongs to the next of kin: *Fowler v. Garlike*, 1 Russ. & M. 232. In *Browne v. Yeall*, referred to in 7 Ves. 50, note, personal estate was given by will to trustees, to be from time to time forever applied "to the purchasing of such books as by a proper disposition of them under the following directions might have a tendency to promote the interests of virtue and religion and the happiness of mankind; the same to be disposed of in Great Britain or in any other part of the British dominions; this charitable design to be executed by and under the direction and superintendency of such persons and under such rules and regulations as under any decree or order of the high court of chan-

cery shall from time to time be directed in that behalf." Lord Thurlow held that it was not a trust which the court could execute, and that the next of kin were entitled to the fund. In *Morice v. Bishop of Durham*, 9 Ves. 399, S. C., 10 Id. 521, a testator had bequeathed all his personal estate to the bishop of Durham, upon trust, after the payment of debts and legacies, to dispose of the residue to such objects of benevolence and liberality as the bishop in his own discretion should most approve of. The master of the rolls, Sir William Grant, was of opinion that the trust could be completely executed without bestowing any part of the residue upon purposes strictly charitable, and that it could not therefore be said that the fund was given to charitable purposes; and as the trust was too indefinite to be disposed of for any other purpose, it was held that the fund should be disposed of among the next of kin of the testatrix. This decree was affirmed by Lord Eldon. In the course of the opinion the lord chancellor remarked that it was not contended, and that it was not necessary to support the decree to contend, that the trustee might not, consistently with the intention, have devoted every shilling to uses in that sense charitable. But the true question, he said, was whether he might not equally, according to the intention, have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes as understood by the court. If he could do so, and it was his opinion that he might, he could not be called to account for maladministration. He therefore held that the court could not decree the execution of the trust. In the case before the court, the legatees might expend the fund for purposes promotive of universal civilization, which still would not be charitable objects in the understanding of the law.

This being, therefore, clearly a case in which the law of charitable uses does not aid the bequest, and does not in truth in any way apply, we are not called upon, or, in my judgment, at liberty to review, the cases which have been determined upon that branch of the law. The case is submitted to us without argument, upon written points, which assume that the case of *Williams v. Williams*, lately decided in this court, lays down the law as held in this court in regard to charitable trusts: 8 N. Y. 524. It has long been a subject of dispute in the courts of this country whether the peculiar jurisdiction of equity in respect to charities originated in the statute of charitable uses. If it did, it was abrogated when that statute was repealed. If it was a

portion of the jurisdiction of the English court of chancery, independently of that statute, it is in force in this state, according to the constitution, and to be enforced by the courts until repealed or modified by the legislature. So far as this court is concerned, the question has been settled in favor of the jurisdiction in the case just referred to. It is no doubt competent for us to re-examine that judgment, though for obvious reasons we ought to be reluctant to disturb a decision deliberately made here; and we should not do it except in rare and exceptional cases. Our judgments are precedents for the courts of original jurisdiction, and they are, moreover, evidence of the law upon which the citizens of the state are accustomed to act, and upon which they ought to be allowed to act safely. A question upon which so much may be said upon both sides, and upon which so much argument has been expended, should be considered as at rest when it has been determined in this court. It is the more necessary to adhere to this principle when we take into consideration the constitution of the court. A change of one half or of a greater number of the judges takes place annually, and if the rule be established that every judgment which we give is open to reinvestigation upon any change of the members of the court, the legal rules upon which the community are to act will be subject to continual fluctuations, and nothing can be considered as settled; and whenever it is proper to review one of our own decisions, it should be done in a case where the same question again arises, and has been presented, at least, if not argued by counsel.

I am in favor of affirmance for the reasons which I have stated.

A. S. JOHNSON, T. A. JOHNSON, HUBBARD, and WRIGHT, JJ., concurred in the opinion delivered by SELDEN, J., and were in favor of affirming the judgment of the supreme court for the reasons therein stated.

They, the four judges above named, with DENIO, C. J., and COMSTOCK, J., were of opinion that the judgment should be affirmed on the ground that the object of the charity was not sufficiently defined by the terms of the will. SELDEN, J., expressed no opinion as to this last proposition, and COMSTOCK, J., none as to the questions discussed in the opinion of SELDEN, J.

MITCHELL, J., dissented, and was of the opinion that the judgment of the supreme court should be reversed, and the decree made by the surrogate affirmed.

Judgment affirmed.

CHARITABLE USES, AND DEVISES THERE TO.—This subject is discussed at considerable length in the note to *Dashiell v. Attorney General*, 9 Am. Dec. 583. See also *Urney's Ex'rs v. Wooden*, 59 Id. 615, and cases collected in the note thereto. If a trust is not certain and definite, it must fail, but a devise of property to executors, "to be divided among such Roman Catholic charities, schools, or churches in the city of New York as the majority of the executors may think proper," is not void for uncertainty: *Power v. Cassidy*, 16 Hun, 296; S. C., 54 How. Pr. 6; affirmed in S. C., 79 N. Y. 613. But a devise of property "to be distributed to the poor of St. Peter's Church," is void for uncertainty: *Flanagan v. Flanagan*, 8 Abb. N. C. 415. So, a bequest to "the orthodox protestant clergymen of Delphi, and their successors, to be expended in the education of colored children:" *Grimes's Ex'rs v. Harmon*, 35 Ind. 205, all citing the principal case. So it is cited on the same point in *Phelps v. Phelps*, 28 Barb. 150, where certain religious and charitable legacies were held valid, in accordance with its doctrine. The rule is well settled, that when a gift of this nature is capable of being executed by a judicial decree there is no reason why a court should not execute it: *Power v. Cassidy*, 79 N. Y. 613. In *Grimes's Ex'rs v. Harmon*, 35 Ind. 205, it is said that "a charitable donation, precise and definite in its purpose, void at law because the beneficiaries are unascertained, may be maintained if there be a competent trustee to take the fund and effectuate the charity. If there be no such trustee, it fails, and the heir or next of kin is entitled;" citing the principal case and others. The rule is, that to constitute a valid charitable use, there must be: 1. A competent trustee; and 2. A use for some purpose clearly defined: *Sherwood v. American Bible Society*, 1 Keyes, 567, also citing the principal case. That the trust cannot be executed, and the bequest or devise does not vest, where there is no trustee competent to take in such a case, is a point to which the case is cited in *Attorney General v. Reformed Protestant Dutch Church*, 33 Barb. 314 (in the opinion of the court below); *Boyce v. St. Louis*, 29 Id. 656; S. C., 18 How. Pr. 132; *Downing v. Marshall*, 23 Id. 15; *In re Trustees of New York etc. School*, 31 N. Y. 589. *Downing v. Marshall*, *supra*, was a case of a devise to a corporation prohibited by statute from taking a devise; and *Boyce v. St. Louis*, *supra*, was a case of a devise of realty to a city in another state. If there is a competent trustee, although there is no ascertained or ascertainable beneficiary, it is said in *Goddard v. Pomeroy*, 36 Barb. 555, citing *Owens v. Missionary Society etc.*, that a gift to a charity will be sustained if the charitable use is so clearly and certainly defined as to be capable of being specifically enforced as intended by the donor. But on this point it is said in *Levy v. Levy*, 33 N. Y. 102: "The learned judge who prepared the leading opinion in *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 586, was certainly mistaken in conceding that, at common law, a limitation, with a trustee named, for a definite purpose, was maintainable, although there was no ascertained beneficiary. It was a mere *dictum*, which would uphold almost all conceivable trusts, unnecessary to the decision of the case, not having the concurrence of the court, and without any authority cited in support of it, but in opposition to the whole current of authority." The principal case is referred to, with others, in *Heiss v. Murphy*, 40 Wis. 20, as an authority upon this subject, and the court say that while there are doubtless cases in which "vague and uncertain" bequests to charity have been sustained, "these cases mainly rest upon the doctrine of *cy pres*, which is a doctrine of prerogative or sovereign function, and not strictly a judicial power."

The case is cited also to the following points relating to this subject: Devises to charitable uses have often been held valid by the New York court of appeals, notwithstanding objections that they tended to create perpetuities, and were not authorized by the statutes of that state: *Levy v. Levy*, 40 Barb. 625. A trust in personalty which is not in conflict with the statute regulating the accumulation of interest and protecting the suspension of absolute ownership in property of that character, is valid when the trustee is competent to take, and a trust is for a lawful purpose well defined, so as to be capable of being specifically executed by the court: *Holmes v. Mead*, 52 N. Y. 344. The English law of charitable uses is derived from the jurisdiction of the court of chancery over trusts, from the prerogative of the crown and from the statute of 43 Eliz.: *Beekman v. Bonser*, 23 Id. 307. And the jurisdiction of the New York supreme court over trusts for such purposes is identical with that of the English court of chancery over trusts in general: *Beekman v. People*, 27 Barb. 283. See generally, as to the jurisdiction of courts of chancery over charitable trusts, *Urney's Ex'rs v. Wooden*, 59 Am. Dec. 615, and cases collected in the note thereto. The case is also cited as an approved authority upon the question whether or not the law of charities is derived from the statute of 43 Eliz., above mentioned, in *Ruth v. Oberbrunner*, 40 Wis. 256, 257; and *Grimes's Ex'rs v. Harmon*, 35 Ind. 245.

DEVISES AND BEQUESTS TO UNINCORPORATED SOCIETIES for charitable or other uses: See *McIntire v. Zanesville etc. Co.*, 34 Am. Dec. 436; *Burbank v. Whitney*, 35 Id. 312; *Zimmerman v. Anders*, 40 Id. 552; *Bridges v. Pleasants*, 44 Id. 94, and notes. That such devises and bequests are void for want of capacity to take is a point to which the principal case is cited in *Lutheran etc. Church v. Mook*, 4 Redf. 515; *Chamberlain v. Chamberlain*, 3 Lans. 368; *In re Roman Catholic Soc.*, 4 Id. 16; *White v. Howard*, 52 Barb. 308; *First Presbyterian Soc. v. Bowen*, 21 Hun, 390; *McKeon v. Kearney*, 57 How. Pr. 353; *Betts v. Betts*, Id. 355, note; *Downing v. Marshall*, 23 N. Y. 382, all of which were cases of religious or charitable bequests. In *Estate of Ticknor*, 13 Mich. 55, it is held that a bequest of personalty to an unincorporated society not upon any permanent trust is valid, and Campbell, J., says: "But there is very little authority for the claim that an unincorporated body of persons may not take an unconditional bequest of personalty not charged with any permanent trust. It is said, indeed, in *Owens v. Missionary Society of M. E. Church*, 14 N. Y. 380, that 'nothing is better settled than that a devise or bequest to an unincorporated association is, in general, void as well in equity as at law,' and upon this remark, without further reasoning, it was held in that case that without the interposition of some charitable use, which might give a ground for the peculiar interposition of the chancery jurisdiction over charities, a bequest to such a society was void. But the authorities referred to as sustaining this *dictum* all related to devises or permanent trusts. Nor have we been able to discover any authority giving color to such a sweeping assertion."

DAVIS v. MAYOR ETC. OF NEW YORK.

[14 NEW YORK (4 KERNAN), 506.]

CITY CANNOT AUTHORIZE LAYING RAILROAD IN STREET, to be operated for private gain, without express statutory power.

AMENDMENT PURPORTING TO BRING IN NEW PLAINTIFF (here the attorney general) in place of an individual who began the suit, but has been judicially found not to have a right of action, is not authorized by New York code of procedure.

SUIT TO ENJOIN CONSTRUCTION OF RAILROAD ALONG CITY STREET cannot be maintained by one who does not own real property on the street, to which the proposed railroad will be specially injurious; that he is a resident and tax-payer in the city does not give him a right of action.

APPEAL to review decisions of the New York superior court. The action was originally brought by Thomas E. Davis and Courtlandt Palmer, to restrain the construction of a railroad which the common council of New York city had authorized, or were about to authorize, Jacob Sharpe and others associated with him to construct along Broadway in the city. The complainants objected to the proposed road as likely to prove a nuisance, etc., as appears in the opinion. It appeared, however, that complainants had no interest in lands which would be specially affected, injuriously, by the railroad if constructed; but sued only as residents and tax-payers; and the court below held that this interest was not sufficient to warrant them in suing; that the attorney general was the proper representative of the general interests of residents and tax-payers; and that the code of procedure authorized an amendment bringing him in; which was ordered. In the suit as prosecuted by him, the court further held the grant of the franchise to lay tracks on Broadway void: See 2 Duer, 663; 3 Id. 119. The appeal sought a revision of these decisions.

David Dudley Field, for the appellants.

John Van Buren and Samuel Beardsley, for the respondents.

By Court, DENIO, C. J. The question whether the railway proposed to be constructed in Broadway would be a public nuisance arose upon the pleadings, and it was a question of law. The width of the street and of the contemplated railway, its position relatively to the surface of the pavement, the length of the cars to be used, and the power by which they were to be moved, with the character of the street as a crowded thoroughfare extending through the heart of a populous city, were facts about which there was no material disagreement in the plead-

ings. The degree of inconvenience which the railway would occasion to persons owning or occupying property on the street, and the advantage and accommodation it would afford to the whole community, were, if material, open questions, to be determined by the evidence. If the admissions in the pleadings showed that the railway, if constructed, would be a public or private nuisance, neither the testimony nor the finding of the judge would affect the legal result which would follow from these admissions. The questions to be determined are, therefore, whether the defendants had acquired a lawful right to construct the railway, and if they had not, then whether what they avowed they proposed to do would, in point of law, amount to the offense of nuisance. If the transaction between the corporation on the one part, and Sharp and his associates on the other, by whatever name it may be called, was a legal act, conferring upon the latter the rights and privileges which it proposed to give them, then it is impossible that the railway should have been a public nuisance, that being an offense which cannot be predicated of the lawful exercise of authority upon a subject to which it is applicable. It is therefore necessary to inquire, in the first place, whether the common council had power to authorize the construction and establishment of the railway, according to the provisions of the resolution.

If it shall appear that the proceeding was unauthorized and illegal, then it will become important to ascertain what the character of the act which Sharp and his associates propose to perform in Broadway would be, if it were sought to be done by individuals of their own authority. A railroad has no necessary relation to or connection with a common highway or street. It may be laid along the surface of such a road where the grade will permit it, but it may equally well run through the country, remote from a highway, and upon a level graduated for the purpose. When a railroad and a highway coincide, the circumstance is simply accidental. They are separate and distinct agencies to facilitate passage and traffic, differing from each other in many essential particulars. The object of a highway or street is to afford to every citizen an opportunity to pass on foot or with his horses and carriages from one locality to another, and it is essential to the legal idea of such a road that it shall be common to all. Where the question on the trial of an indictment was, whether the place where an obstruction had been put was a highway, Sir Matthew Hale said that, to entitle it to that character, it must be a "way for all travelers:" *Austin's Case*, 1 Vent. 189.

"The king's highway" is defined in English law to be a public passage for the king and his subjects, and thence its name is derived; and the test whether a road is entitled to that designation is to inquire whether it be common to all the people: Woolrych on Ways, 3. A road does not cease to be a highway by being subjected to the control of a turnpike or plank-road corporation, this being considered as a method of keeping it in repair, and of taxing the travel upon it for that purpose: *Benedict v. Goit*, 3 Barb. 469; *Commonwealth v. Wilkinson*, 16 Pick. 175. Now, a railroad does not facilitate traveling on foot or on horseback, or with one's own carriages. It does not generally admit of those methods of passage; although, where the railroad carriages are not moved by the power of steam, but by horses, the tracks, where they do not rise above the street level, may be safely crossed, and to a limited extent may be used for passing lengthwise. This is, however, only incidental, and not a necessary feature of a railroad. Those who use a railroad for its proper purposes do not travel according to their own volition, but are transported like freight or baggage by the proprietors of the road, in their own vehicles.

But the feature which most widely distinguishes a railroad from ordinary highways and streets is, that the former is a strict monopoly, entirely excluding all idea of competition. A traveler who would go upon a railroad must take his seat in the carriage of the proprietors, and pay them the price of his transportation. The nature of the subject requires a unity of control and management, which precludes the existence of competing carriages. There may be rival roads, but there can be no rivalry on the same road; and no more than one road can exist in Broadway without excluding altogether every other kind of traveling with carriages. We may be allowed, without the testimony of witnesses, to know enough of the method of operating railroads to say that their carriages are quite unlike the vehicles used on other roads. They are necessarily large machines, occupying the space which would be required for several carriages of any other kind, and containing passengers enough to fill a great many of the carriages used on other streets or roads. I have mentioned these particulars which distinguish a railroad from every other species of way, for the purpose of explaining the reason why, in my judgment, the establishment of such a road is not within the jurisdiction conferred upon the corporation of New York over the roads and streets in that city. The power of the corporation over this subject is necessarily very large. It may lay

out, open, alter, repair, and amend and regulate streets, lanes, alleys, and highways, and may direct the draining, pitching, and paving of them; and moreover, the common council are commissioners of highways, and they may discontinue and close up streets in the manner specified in the act: The Montgomerie Charter, Kent's Charter, 15, 99, and note 31, p. 235; R. L. of 1813, secs. 193-197; Laws of 1818, c. 213; Laws of 1824, c. 49. But this power relates to and is confined to streets, lanes, etc., as such. Everything which is fairly within the idea of regulating, altering, repairing, or amending the streets, with a view to their uses and purposes as streets, may be exercised by the corporation, but the converting of a street or a part of a street into a new piece of machinery for transporting persons with which the existence of a street has no natural or necessary connection, is not, in my judgment, at all within the purview of the charter and acts of the legislature to which I have referred. If an existing street can be converted into a railway, I see no reason why the corporation cannot authorize the laying out of a railroad where at present no street exists. They have as ample power to lay out and establish streets as to alter and amend them; and if they can consider a railway as falling within the legal notion of a street, the power extends as well to the laying out of new railroads as to changing the present streets into railroads. They can exercise the right of eminent domain in the opening of new streets, and if a railroad is only an improved species of street, the power could be rightfully applied in constructing a railroad whenever it might be considered that the public good would be promoted by it. I have examined with respectful attention the several cases in which the power which I have been examining is claimed to have been expressly or impliedly affirmed. They are, without exception, cases in which the right to establish the railroad at the places where it was proposed to be constructed had been granted, mediately or immediately, by the legislature. In some of them, it is true, the right was challenged on the ground that compensation had not been provided for the taking of or the injury to private property, and the exception in that respect was not allowed: *Lexington & Ohio R. R. v. Applegate*, 8 Dana, 289; *Hamilton v. New York & Harlem R. R. Co.*, 9 Paige, 171; *Drake v. Hudson River R. R. Co.*, 7 Barb. 508; *Plant v. Long Island R. R. Co.*, 10 Id. 26; *Adams v. Saratoga etc. R. R. Co.*, 11 Id. 414; *Milbau v. Sharp*, 15 Id. 193; S. C., 17 Id. 437; *Stuyvesant v. Pearsall*, 15 Id. 244; *Chapman v. Albany & Schenectady R. R. Co.*, 10 Id. 360; *Wil-*

liams v. N. Y. Central R. R. Co., 18 Id. 222, now under review in this court. In none of these adjudications, with the exception of the one in the court of appeals of Kentucky, has the position which I am opposing been affirmed in a case requiring its determination, though it is true in several other cases, as in *Drake v. Hudson River R. R. Co.*, *supra*, and in *Adams v. Saratoga R. R. Co.*, *supra*, the position has been stated as contended for by the defendants' counsel in this case, and in others it has been assumed to be the law.

It has been laid down in the case in Kentucky, and in *Williams v. New York Central Railroad Company*, *supra*, it may be said to have been decided by the supreme court of this state, that the laying of a railroad in a street or highway is only a new and improved method of making use of the public easement over lands dedicated or appropriated, pursuant to law for a street or highway. This doctrine has been predicated of what is truly said to be the plastic and accommodating nature of the common law. That system of jurisprudence is, no doubt, a code of principles, as distinguished from one of positive and arbitrary prescriptions; and where a doctrine of common law can, without violence, be applied to a state of things brought into existence by the change of times or the progress of civilization, it may often be properly applied, though the facts are circumstantially different from those which existed when the rule was originally established. But the difference between a highway in the country, or a street in a city or village, and the modern contrivance of transporting persons by railroad cars running upon a grooved iron track, is, in my judgment, radical in its nature, and is not capable of being subjected to the same legal rules. The legislature appears to have taken the same view of the subject which I entertain, for whenever it has been considered necessary or proper to allow a highway or street to be used to any extent for the purpose of a railroad, the right has been conferred in express terms. The first railroad company chartered in this state was the Mohawk and Hudson, which was to run between Schenectady and Albany. The eleventh section of the act gives the directors the right, whenever it becomes necessary to cross any road or highway, to run the track "across or upon" the same: Laws of 1826, 289. A similar provision is contained in all the railroad charters granted prior to the year 1836, when the Attica and Buffalo company was chartered with the same provision, connected with a direction to the company to restore the road, so as not unnecessarily to have impaired its usefulness;

Laws of 1836, 325, sec. 11. Most of the subsequent acts granting railroad charters adopted the Attica and Buffalo act as a pattern bill, with the provision respecting roads and highways which I have mentioned. In 1835 an act was passed for the benefit of associations or individuals who might engage in constructing a railroad upon lands purchased by themselves, by which the commissioners of highways were authorized to give a written consent for the tracks to be laid across or along the highways: Laws of 1835, c. 300. The constitution of 1846 enjoined upon the legislature the providing for the creation of corporations by general acts; and accordingly, in 1848, and again in 1850, general statutes were enacted for that purpose, in each instance containing a provision similar to the one which has been referred to, in the several special charters, enlarged by giving the corporations of cities the powers conferred upon commissioners of highways: Laws of 1848, 227, sec. 19, subd. 5; Laws of 1850, 224, sec. 28, subd. 5.

The special subject of railroads passing through or terminating in cities early engaged the attention of the legislature, and in particular cases, where such roads terminated in the city of New York, express power was given to the municipal government to license their location in the streets: Charter of the N. Y. & Harlem R. R. Co., Laws of 1832, p. 156, sec. 1; Charter of the Hudson River R. R. Co., Laws of 1846, p. 272, sec. 1. It will be remembered that the cases provided for in these statutes were railroads running from one part of the state to another, and to be located, for the most part, in the country, and upon land to be purchased or acquired by the companies, and where the intersection of a highway, or the running upon the streets of a city, was merely an incident of the general design, and where the whole enterprise would be greatly embarrassed or entirely frustrated unless some power to run upon highways or streets were vested in some public body or magistrate. The acts assume that without legislative authority the railroad corporations would have no right to interfere with any public road or street. To leave no doubt respecting the intention of the legislature, an act was passed, in 1854, expressly forbidding the municipal councils of cities to permit a railroad, commencing and ending in the city, to be established in any street or avenue without the consent of a majority in interest of the owners of property upon the street: Laws of 1854, c. 140. The corporation of New York, in the instance under consideration, assumed to establish a railroad, running wholly on a city street, without any other legislative authority than the general power to regulate, amend, and alter the streets, roads, and alleys of the city. Up to a certain period

the supreme court of this state seem to have entertained the views upon this subject which I have considered sound. In *Fletcher v. Auburn & Syracuse Railroad Company*, 25 Wend. 462, and again in *Trustees of the Presbyterian Society in Waterloo v. Auburn & Rochester Railroad Company*, 3 Hill (N. Y.), 567, the question arose, whether the clause in the railroad charters to which I have referred furnished a defense to a railroad company against the reclamation of the owner of the soil in a highway over which a railroad had been located. In other words, the point to be determined in each of these cases was, whether an easement for the purpose of a highway authorized, as against the proprietor of the soil, the laying down of a railroad upon the track of such highway. The court decided against the railroad companies, holding that the statute related only to the right of the public; and that if it could be construed to affect the interest of the individual proprietor, it was void for want of a provision for compensation. It was held that the use of the land by the railroad company was wholly different from that public right of passage, to promote which highways were established. These cases, if correctly decided, are conclusive upon the question we are examining. It was said on the argument of the present case that these adjudications were inconsistent with the resolution of the court of errors in *Bloodgood v. Mohawk & Hudson Railroad Company*, 18 Wend. 77, to the effect that the legislature may authorize a private company to take the property of a citizen for the construction of a railroad, making provision for compensation. It is a sound inference from this principle that the construction of a railroad is to be regarded as a public object, and that it promotes the public good. But it by no means follows that it is an object of the same nature as that which highways are established to subserve. Where an easement is granted or acquired for a public highway, the owner of the soil cannot complain of any use which the land may be put to, substantially of that character; but it cannot be lawfully appropriated without compensation for the construction of an arsenal or magazine, or a market, though such structures should be authorized by the legislature for purposes purely public. It may be that in the case reported in 25 Wendell the court overlooked the principle that compensation is not necessary to be made where property is not taken, but only subjected to consequential damages by means of a public work: *Radcliff's Executors v. Mayor etc.*, 4 N. Y. 205 [53 Am. Dec. 357], *per* Bronson, J. But conceding that to be so, it does not affect the authority of the case as to its application to the present question.

The foregoing considerations have led me to the conclusion that the resolution of the common council, granting to the defendant Sharp and others the right to lay down a railroad in Broadway, was without the scope of the powers of the corporation, and was wholly unauthorized and illegal.

But I think it was illegal for another reason. It is not pretended that more than one railway can be laid down in that street without destroying it as a road for the passage of other carriages and vehicles. The resolution did not contemplate any participation on the part of the public or the citizens generally in the ownership or in the profits of the contemplated railway. Indeed, it is not susceptible, as has been shown, of any such participation. The public might, indeed, as passengers, be benefited by the use of it; but as a business enterprise it was to be carried on by and for the emolument of the associates alone. The manifest design of the resolution was to confer on the associates the exclusive right of carrying passengers by railroad on this public street for profit, and it was this circumstance alone which rendered it of any value to those who sought to obtain it. I will suppose, then, that it would be wholly unobjectionable as an obstruction in, or an interference with, the street, and that it would not impair in the slightest degree the adaptation of that thoroughfare for all other purposes for which it could ever have been used. The right granted to these associates would be the very definition of a franchise. The privilege of making a road or bridge, or of establishing a ferry, and of taking tolls from the citizens for the use of the same, are among the most common examples of a franchise: 3 Kent's Com. 458; 2 Bla. Com. 37; *Charles River Bridge v. Warren Bridge*, 11 Pet. 639, *per Story, J.*; Chancellor Walworth, in *Beekman v. Saratoga & Schenectady Railroad Company*, 3 Paige, 75 [22 Am. Dec. 679], said: "The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same." The corporation of New York may, without doubt, make grants of this character respecting the public waters which surround the city, but independently of that power, which is in terms conferred by the charters, they have no more authority to make such a grant than any other administrative board in the state. If they could make this grant, they could charter upon the city streets a turnpike or plank-road company. They could grant to individuals the right to pave or otherwise improve the streets, and to impose tolls thereon, to be exacted from all who should travel upon them.

I do not now speak of the attempt to give a power to establish a succession in the nature of a corporate succession, for the grant would be equally objectionable in this aspect of it, if it was made to an individual and his assigns. The answer given to this view of the case, upon the argument, was that the board could, in the exercise of what is called its legislative power, rescind its resolution at its pleasure. Without examining the authorities upon which that argument is founded, the applicability of which to this case I am not, however, prepared to admit, I do not see that the grant would be any the less objectionable had it contained upon its face the reservation of a right to rescind it at pleasure. The board had no power to grant to any person a franchise for transporting passengers on the public streets for profit for a single day, and the attempt to do so was absolutely void.

If the foregoing conclusions are sound, the defendants, at the time the amended complaint was filed, were, of their own authority as private individuals, and without any lawful right, about to convert the central part of Broadway into a railroad, by taking up portions of the pavement, and laying iron tracks thereon, and putting upon those tracks cars for the transportation of passengers for their own profit; and the only remaining question is whether the proper form of remedy has been adopted by the parties who have instituted this suit. I have already said that if authority to establish the railroad had been granted by the legislature, mediately or immediately, the road could not have been a nuisance; and this is all that the cases upon the subject in this state establish. But the defendants were about to proceed without any such authority; and before speaking of the remedy, it is necessary to determine the other question which I have stated, What would have been the legal character of the act if the defendants had been suffered to perform it? In my opinion, it would, upon the facts admitted in the answer, have been a public nuisance. Any permanent or habitual obstruction in a public street or highway is an indictable nuisance, although there be room enough left for carriages to pass, and it is not less so though the thing which constitutes the obstruction is not fixed to the ground, but is capable of being, and actually is, removed from place to place in the street. If the railway proposed to be constructed by the defendants were in operation, it could not fail to happen that Broadway would at all times during the day be incumbered by a great number of those large receptacles for railway passengers which are an essential part of the apparatus

of a railway. If authorized by law to run upon the street, the inconvenience would have to be submitted to; but if placed there without right, the authors of the act could not defend themselves from the charge of nuisance. The authorities for this position are constant and uniform, and leave no doubt upon the question: *Fowler v. Saunders*, Cro. Jac. 446; *Rex v. Russell*, 6 East, 427; *Rex v. Carlile*, 6 Car. & P. 636; *Rex v. Cross*, 3 Camp. 226; *Rex v. Jones*, Id. 230; *Rex v. Moore*, 3 Barn. & Adol. 184; *Commonwealth v. Passmore*, 1 Serg. & R. 219; *Rex v. Ward*, 4 Ad. & El. 384; *People v. Cunningham*, 1 Denio, 524; *Hart v. Mayor of Albany*, 9 Wend. 571 [34 Am. Dec. 105].

The question is not before us whether the advantages arising from the establishment of a railroad in the street would not be an ample compensation for all the injury and inconvenience which the public would suffer from the obstruction it would occasion. It may be that upon the whole such a change in the character of the street would be a public benefit; but this is for the legislature to determine. In the case of *King v. Ward*, which was an indictment for a nuisance, in a navigable river and king's common highway, by erecting a certain building of stones across the stream and water-way of the river, the jury found the fact that the alleged nuisance had been erected by the defendant, but that the inconvenience was counterbalanced by the public benefit arising from the alteration thus made. The court held that this finding amounted to a verdict of guilty. Lord Denman, C. J., stated the principle with great distinctness: "In the infinite variety of active operations always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the first condition of being compelled to compensate any portion of the public which may suffer for their advantage." See also the opinion of Lord Tenterden in *Rex v. Russell*, 6 Barn. & Cress. 566.

It is well settled that where such an offense occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain juris-

diction of the case at his suit; and also that the attorney general, in all cases where a preventive remedy is called for by the circumstances, or the state in its own name, may apply for an injunction against the perpetrator of the wrong: 2 Story's Eq. Jur., secs. 921, 922; *Attorney General v. Cohoes Co.*, 6 Paige, 133; *Baines v. Baker*, Ambl. 158; *Sampson v. Smith*, 8 Sim. 272; *Spencer v. London & Birmingham R. R. Co.*, Id. 193; *Attorney General v. Richards*, 2 Anst. 603; *Corning v. Lowerre*, 6 Johns. Ch. 439.

But the allegation that the plaintiffs were the owners of lots in Broadway was put in issue by the answer, and the affirmative has not been found to be true; and besides, the judge who tried this cause has found, as a matter of fact, that constructing the railway would not be specially injurious to the plaintiffs. I do not see, therefore, how, consistently with these findings, the action can be sustained in their behalf, and such seems to have been the view of the superior court at special term. The attorney general was on that account made a party plaintiff; but to the granting of this order the defendants objected, and from it they appealed to the general term. By the terms of the code that order is reviewable here, provided it involves the merits, and I am unable to deny that if the defendants were entitled to have the complaint dismissed for want of interest on the part of the plaintiffs, the order, which virtually refused such a judgment, and which admitted the substitution of a party standing in a different and better position in that respect, was one which involved the merits of the action. The names of the original plaintiffs, it is true, remain on the record; but this does not improve the plaintiffs' case, if they are not in a situation to maintain an action. The general term sustained the judgment on the ground that the order in question was authorized by certain sections of the code of procedure (sections 122, 173). By the first of these sections the court is authorized to "determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." Section 173 relates to amendments, and is in very comprehensive terms. The court may add or strike out the names of parties, or correct a mistake in any respect; and it may confine the pleading or proceeding to the facts proved, when the amendment does not change substantially the claim or defense. The section first quoted evidently

refers to cases where one or more of the original parties had such an interest as would enable him to sustain the action, but where the controversy would not be completely settled without the presence of other parties. This was a familiar rule of the court of chancery, which would have been properly stated in the precise words of this section. The other section contains language, if construed literally, broad enough to embrace this case. A possible construction of the power to strike out and to insert the names of parties would admit the striking out of all the existing ones, on the ground that they had no cause of action, and inserting an entirely new set who really had such right, but this would be too unreasonable to have been intended. So with the unlimited provision to correct a mistake. It cannot authorize the giving of judgment in favor of parties who have no right to the subject in litigation. So also with the provision authorizing the conforming of the pleading or proceeding to the facts proved. This, I think, does not permit an entire change of parties on one side. It obviously relates to the facts given in evidence on the trial.

If the original parties had shown an interest in themselves which would have entitled them to invoke the jurisdiction of the court, and the only difficulty had been that the judgment would not have been complete without the intervention of a party who would represent all others who had a similar interest, the case would be relieved from its present embarrassment. The view of the superior court was that it presented such a case. By section 119 of the code, where the question in an action is one of common and general interest or where the parties are very numerous, one or more may sue or defend for the benefit of the whole. This is also a rule borrowed from the practice of the late court of chancery. It would be giving an undue extension to this rule to hold it to embrace such a case as the present. The relief to be granted in this action must proceed upon the ground that the act imputed to the defendants is either a public nuisance, or the usurpation of a franchise detrimental to all the people of the state. It may not affect every citizen equally, but in judgment of law, assuming that no special injury is shown, they have an equal right to complain. Now, it cannot be maintained for a moment that an action will lie by an individual citizen for such an offense. Such a rule would confound all distinctions between public and private rights and remedies, and would introduce inextricable confusion.

I am of opinion, therefore, that the judgment appealed from should be reversed. Whether the complaint should be dismissed depends upon some other considerations. The finding that the railway, if established without lawful authority, would not be a public nuisance, was contrary to the admissions in the pleadings, and must be disregarded. It was arrived at, I presume, by taking into consideration the supposed advantages of a railway; for in one of the opinions with which we are furnished the question of nuisance in this case is stated to be a problem which experience alone can solve. Experience would only be useful in balancing the advantages of the railway against the effects of the obstruction and inconvenience it would cause. We have seen that the law regards an unauthorized obstruction of a highway as a nuisance *per se*. It is also found that the railway would not be specially injurious to the plaintiffs; but there is no finding upon the question whether they were the owners of lots on Broadway, as alleged in the complaint. If the finding, that it would not be specially injurious to the plaintiffs, was based upon the idea that it was problematical whether it would or would not be, upon the whole, advantageous to the persons more particularly interested in Broadway as a thoroughfare, as is highly probable from what is said in the papers upon the general question of nuisance, the point was determined upon incorrect principles, and the question should be again submitted to the court, with the law relating to it ascertained and settled. I am therefore in favor of reversing the present judgment and awarding a new trial in the superior court.

COMSTOCK, J. The judgment should be reversed for the reasons stated by the chief judge. I am not able, however, to assent to his views in regard to the power of the common council over the subject embraced in the resolution out of which the present controversy has arisen. I am confidently of opinion that the municipal government of New York may construct, or by mere license authorize others to construct, an iron track in Broadway, adapted to vehicles of the kind used upon railroads, and that licenses may be granted to the owners of such vehicles, as other carriages are now licensed. Without going at large into the discussion, my reasons briefly are as follows:

As I have defined this power, it cannot be objected to its exercise that it grants a franchise or monopoly. It is true that railroads are usually built by private corporations, organized under special charters or general laws, and the right so to build and to

use them exclusively becomes a corporate franchise. A road thus constructed becomes the property of the corporation which builds it, and all others are excluded from its use. But it by no means follows that a railroad track may not exist in a public highway in a city, open to the public use as a street improvement, under such regulations as the municipal government charged with the superintendence and control of streets may see fit to prescribe. The idea of a corporate franchise or of a monopoly existing in favor of individuals or associations of individuals has no necessary connection with a railroad. Railroads are physical improvements, and they may or may not possess the characteristics of a monopoly or franchise, according to the conditions under which they are built and used. If they simply constitute a feature of the public highway, and are open to the public use, then it is extremely plain that they are not liable to objections of this character.

The inquiry then next occurs, Is there an absolute incompatibility between a highway and a railroad track laid upon it for the public use? This is not a question whether the track of a private corporation or of an association of persons can, under municipal or legislative authority, be rightfully laid in a public street without compensation to the owners of the soil, where that is owned by individuals. The course of judicial decision is certainly in favor of that right, upon the ground substantially that the public easement or highway is not destroyed or obstructed, but only used according to a new and improved mode, although the iron track is not owned by the public, and the public can only use it by riding or conveying their property in the cars of those who are its owners. But this, I repeat, is not the question. Can a highway and a railroad track co-exist and constitute one public easement, where no person or corporation can claim an exclusive right to use the track, and where all may use it under such regulations and licenses as the municipal government may provide? Of this I do not entertain any doubt.

But if we were disposed to doubt upon this question, or even to deny the conclusion stated, still the inquiry is not one upon which the law pronounces a judgment until the facts are ascertained, and to ascertain them we have no power. If a municipal corporation, in the exercise of its authority over streets, determines that iron rails and their use by the licensed portion of the public are a legitimate street improvement, I am not aware of any power in us to determine otherwise. We are in possession of no peculiar knowledge which enables us to declare

that a city government, chartered with full authority to alter, regulate, and improve its thoroughfares, violates its trust or transcends its powers in coming to such a determination, and passing proper ordinances to carry it into effect. For one, I do not know, and I cannot know judicially, that the street known as Broadway, in New York, will be obstructed, or its usefulness on the whole impaired, by a particular kind of carriage drawn by horses upon an iron rail laid down for that purpose. This use of the street may have both its inconveniences and its advantages. It is not for us to say which will predominate.

Whether the proposed railway will be a nuisance is a mere question of fact, and as such it has been found in the negative on the trial in the court below, after the examination of a large number of witnesses. If it had been found the other way, then it might have been the duty of the court of original jurisdiction to interpose by injunction, and arrest the evil on that special ground, and it might be our duty to affirm the decision. But we have nothing to do with the comparative advantages and disadvantages merely of the proposed change in the street. Those were considerations peculiarly addressed to the knowledge and judgment of the local government, charged with the care of all the streets in the city; and I should regard it as a usurpation by courts of power which does not belong to them if they undertake to control the municipal authority in this respect. Courts are certainly not wiser on this subject than the common council of New York; and unfortunately for their right to interfere, the supreme law-making power of the state has vested in the council, and not in them, the power to regulate and control the streets of the city.

Such are my views upon the general question. In regard to the particular resolution of the common council authorizing Jacob Sharp and his associates to construct a railroad in Broadway, I have had some doubts whether it could not be sustained as a mere license revocable at pleasure, and imposing no obligations upon the city government; but my conclusion is that this cannot be done. The resolution in its first clauses is a simple authority to Sharp and others to construct the road in the manner specified, but these clauses are so connected with an entire scheme that the whole must stand or fall together. As the consideration for constructing the road, the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and within a maximum limit they can charge what they please for the carriage of passengers. These rights are in effect granted

in perpetuity, because the only provision for their termination is in case the associates, after ten years, shall decline to pay such license fees "as the corporation, with the permission of the legislature, shall prescribe." In that event the road, with its equipments, is to be surrendered at a fair and just valuation. Taking, therefore, the whole ordinance together, and giving effect to it according to its terms and intention, it is no less than an abrogation by the common council of their powers and duties over and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals or of a private corporation. This the corporation of New York cannot do. Time and experience may, for aught we know, give a very unfavorable solution to the question whether this railroad or any railroad in Broadway can be beneficial to the public, but the hands of the city government will be tied by the contract into which it has entered, and future change and improvement may be prevented by this voluntary surrender of its own powers. On this ground, and without looking at the question in other and more special aspects, I am satisfied that the ordinance is void, and that no effect can or should be given to any of its provisions.

WRIGHT, J., also delivered an opinion to the effect: 1. That the resolution or ordinance of the common council, authorizing Sharp and his associates to construct and operate the road, was valid as a license, revocable at pleasure, although in form a grant or contract; 2. That conceding the resolution or ordinance was void, the original parties could not maintain the action, and that the amendment allowing the attorney general to be made a party plaintiff was unauthorized and erroneous.

All the judges except MITCHELL, J., who took no part, were in favor of reversing the judgment and ordering a new trial.

DENIO, C. J., and JOHNSON, SELDEN, COMSTOCK, and HUBBARD, JJ., were of opinion that the resolution or ordinance was void.

WRIGHT and T. A. JOHNSON, JJ., dissented from this last proposition.

Judgment reversed and new trial ordered.

RAILROAD IN STREET, power of municipal corporation to authorize construction of: See *Lexington etc. R. R. Co. v. Applegate*, 33 Am. Dec. 497; case of *Philadelphia etc. R. R. Co.*, 36 Id. 202; *Nicholson v. New York etc. R. R. Co.*, 56 Id. 390; *People v. Sturtevant*, 59 Id. 536, and cases cited in the notes thereto. The principal case is cited on various points connected with

this subject in very many decisions in New York and elsewhere, as follows: A grant of a right to construct a railroad in a public street is a franchise: *People v. Kerr*, 37 Barb. 393. And without express legislative authority a municipal corporation cannot confer such a franchise upon a railway company: *Chicago etc. R. Co. v. People*, 73 Ill. 548; *Trenor v. Jackson*, 15 Abb. Pr., N. S., 124; S. C., 46 How. Pr. 398; *New York etc. R. R. Co. v. Mayor*, 1 Hilt. 585; *Milbau v. Sharp*, 27 N. Y. 618; *People v. Kerr*, Id. 192; *Ninth Avenue R. R. Co. v. New York Elevated R. R. Co.*, 3 Abb. N. C. 351. The case is cited to the same point in *Milburn v. Cedar Rapids*, 12 Iowa, 256, 257, but is explained as going upon the ground that there was an express prohibitory statute, whereas in that case there was a statute authorizing the construction when the consent of the city was obtained. The appropriation of a highway by a railway company for its track imposes an additional burden or easement upon the owner of the fee, and is therefore a "taking" of his property, which cannot be authorized either by the corporation or the state, except by his consent, or upon due compensation made, as provided by law: *Craig v. Rochester etc. R. R. Co.*, 39 Barb. 501; *Mahon v. New York etc. R. R. Co.*, 24 N. Y. 461; *Bloomfield etc. Gaslight Co. v. Calkins*, 62 Id. 380. Such a railway in the street is the exclusive property of the owners, and not a part of the street which may be used by others: *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 371; *Brooklyn etc. R. R. Co. v. Brooklyn City R. R. Co.*, 33 Id. 421. But one car line may cross another in a street without infringing upon the private ownership: Id. And it has been held that, as a public street is a highway common to all the people, a city railroad company cannot, of its own motion, prohibit or regulate travel thereon, and forcibly exclude persons from its track: *Fettritch v. Dickenson*, 22 How. Pr. 249. The legislature may, however, authorize the construction of a railroad in the street, with the consent of the municipal corporation, where it owns the fee, or with the consent of the adjacent owners where the fee is in them, or upon compensation made to them for the fee only without consequential damages: *People v. Kerr*, 37 Barb. 417; *Pollen v. New York Elevated R. R. Co.*, 3 Abb. N. C. 314. And it seems that the legislature might constitutionally authorize the construction of a railroad in a street at the expense of the city or state, to be used by all, with or without the payment of tolls or license fees: *People v. Kerr*, 37 Barb. 394, citing the opinion of Comstock, J., in the principal case. A legislative authority to construct and operate a railroad in the street is merely a consent to such use on the part of the legislature, and cannot be construed as giving any power to make the appropriation without the consent of the owners of the fee or compensation made to them: *Washington Cemetery v. Prospect Park etc. R. R. Co.*, 68 N. Y. 597; S. C., 4 Abb. N. C. 22. A railroad constructed in a street, under authority of law, if properly conducted, is not a nuisance, however many may be injured by it in person or property: *People v. New York Gaslight Co.*, 64 Barb. 70; S. C., 6 Lans. 468; *Brooklyn City R. R. Co. v. Furey*, 4 Abb. Pr., N. S., 367; nor can the municipal corporation declare it a nuisance, or under pretense of regulation materially impair or affect the franchise: *Brooklyn City R. R. Co. v. Furey*, *supra*. A railroad company authorized to lay a track in the street may also lay a switch, turn-out, and side-track for its use: *Carson v. Central R. R. Co.*, 35 Cal. 333. As a city cannot, without express power from the legislature, authorize the construction of a railroad in the street, neither can it authorize the use of a steam-motor therein, and if it does so, it is liable for an injury resulting therefrom: *Stanley v. Davenport*, 54 Iowa, 469. The legislature cannot transfer a turnpike road to a railroad company without

compensation to the owner of the fee; and where such legislation is attempted, the owner of the fee may bring successive actions for damages for the nuisance, because he is thereby deprived of his reversion of the land: *Mahon v. New York etc. R. R. Co.*, 24 N. Y. 661. In *People v. Kerr*, 27 Id. 192, the principal case was said not to decide that the use of a street for a railroad was not a public use, but only that the city could not authorize it to be permanently used for that purpose. That such a use is a public use, see *Bellinger v. New York Central R. R.*, 23 Id. 48, citing *Davis v. Mayor*.

OBSTRUCTION OF STREET OR OTHER HIGHWAY, AS NUISANCE, GENERALLY: See *Stetson v. Faxon*, 31 Am. Dec. 123; *Linsley v. Bushnell*, 38 Id. 79; *Stump v. McNairy*, 42 Id. 437; *People v. Cunningham*, 43 Id. 709; *Lancaster T. Co. v. Rogers*, 44 Id. 179; *State v. Hunter*, Id. 41; *State v. Thompson*, 47 Id. 588; *Powell v. Deveney*, 50 Id. 738. As to the power of a municipal corporation generally to authorize an obstruction of a street or other highway, see *Lexington etc. R. R. Co. v. Applegate*, 33 Am. Dec. 497; *Case of Philadelphia etc. R. R. Co.*, 36 Id. 202; *Shepherd v. New Orleans*, 41 Id. 269; *Nicholson v. New York etc. R. R. Co.*, 56 Id. 390, and cases cited in the notes thereto; see also the note to the case of *Alton v. Illinois T. Co.*, 52 Id. 487. That the unauthorized continuous obstruction of a public highway is a public nuisance *per se*, is a point to which the principal case is cited in *Moore v. Jackson*, 2 Abb. N. C. 213; *Ninth Avenue R. R. Co. v. New York Elevated R. R. Co.*, 3 Id. 351; *Ely v. Campbell*, 59 How. Pr. 336; *Commissioners v. Erie R. Co.*, 5 Robt. 382; *State v. Berdette*, 73 Ind. 188. Thus columns erected in the street to support an elevated railway are a permanent obstruction, and therefore a common nuisance if unauthorized: *Ninth Avenue R. R. Co. v. New York Elevated R. R. Co.*, *supra*. So a fence which encroaches upon the highway and renders it less safe and commodious is a nuisance, for the public have a right to the entire width of the way: *Harrower v. Ritson*, 37 Barb. 303. So the placing of sheds, buildings, etc., on a bulkhead in the port of New York is a nuisance, though room for passage is left: *Commissioners v. Erie R. Co.*, *supra*. A municipal corporation cannot authorize the permanent obstruction of a highway: *Ely v. Campbell*, *supra*; *Delaware etc. Co. v. Lawrence*, 2 Hun, 181; as by licensing the maintenance of stands in the street: *Ely v. Campbell*, *supra*. But the state may authorize one to erect a wharf on his own land, above high-water mark, upon a public river: *Delaware etc. Co. v. Lawrence*, *supra*. In *Bloomfield etc. Gaslight Co. v. Calkins*, 62 N. Y. 389, it is held that a gaslight company cannot lay its pipes in a country highway without the consent of the owners of the fee, or compensation in the mode provided by law, citing the principal case.

INJUNCTION AGAINST PUBLIC NUISANCE, WHO MAY MAINTAIN.—As to the right of a private person to maintain an injunction to prevent a public nuisance, see *Rosser v. Randolph*, 31 Am. Dec. 712; *Lexington etc. Co. v. Applegate*, 33 Id. 497; *White v. Flannigan*, 54 Id. 668; *Ex parte Martin*, 58 Id. 321; *Whitfield v. Rogers*, 59 Id. 244; *People v. Sturtevant*, Id. 536; *Bigelow v. Hartford Bridge Co.*, 36 Id. 502; *Walker v. Shephardson*, 60 Id. 423, and notes thereto. See particularly, as to the right of a private individual to enjoin the laying of a railroad track, or other nuisance, in a city street, *Lexington etc. Co. v. Applegate*, *supra*; and *White v. Flannigan*, *supra*; see also as to an injunction against granting a franchise for laying a railroad track in the street, *People v. Sturtevant*, *supra*; *People v. Law*, 34 Barb. 507, and *Sidener v. Norristown etc. Co.*, 23 Ind. 627, citing the principal case. The principal case is cited to the point that one not owning property on a street where a railroad is proposed to be laid, and who will not be specially injured thereby, cannot maintain an

injunction to prevent it, in *People v. Cortelyou*, 36 Barb. 167; but it is said that this doctrine does not preclude a tax-payer in a town from appealing from an order laying out a highway there. In *Spader v. New York Elevated R. R. Co.*, 3 Abb. N. C. 475, the case is also cited as an authority for the proposition that an individual cannot sue to prevent the usurpation of a franchise and the erection of a public nuisance such as an elevated railway. So in *Manhattan Gas-light Co. v. Barker*, 7 Robt. 525, S. C., 36 How. Pr. 235, it is held, citing the principal case, that a private person or corporation cannot maintain an action to enjoin the discharge of refuse into a public river. But where an individual suffers special injury from such a nuisance, he may maintain an action to enjoin it: *Mayor v. Baumberger*, 7 Robt. 220. So an individual owning property on a street may maintain an injunction against the unauthorized construction of a railway therein: *Milhau v. Sharp*, 22 Barb. 229; *Craig v. Rochester R. R. Co.*, 39 N. Y. 408; *Clarke v. Blackmar*, 47 Id. 153, all citing the principal case. It is cited to the same point in *Doolittle v. Supervisors*, 18 Id. 163; S. C., 16 How. Pr. 521; but it is held that this principle will not authorize individual members of a proposed new town to maintain an action against the supervisors of the county to prevent the organization of such town. So it is held that a private tax-payer, suffering no special injury therefrom, cannot maintain an injunction to prevent threatened misconduct of municipal officers in levying an illegal tax: *Miller v. Grand*, 13 Mich. 550, also citing the principal case.

But an injunction at the suit of the attorney general is the proper remedy to prevent a purpresture or nuisance in a public river: *People v. Vanderbilt*, 38 Barb. 287; S. C., 26 N. Y. 297; 28 Id. 399; 25 How. Pr. 143; or to prevent the obstruction of a highway: *People v. Clark*, 53 Barb. 176; or to prevent the abuse of corporate powers by the officers of a municipality seriously injurious to the public: *People v. Tweed*, 13 Abb. Pr., N. S., 52; *People v. Mayor*, 32 Barb. 104. But equity will not interfere on the information of the attorney general to abate or prevent a public nuisance, except where there was a want of adequate, legal remedy, and the injury to public rights is of a substantial character: *Attorney General v. Metropolitan R. R.*, 125 Mass. 516.

AMENDMENTS CHANGING CAUSE OF ACTION OR PARTIES: See *Stevenson v. Mudgett*, 34 Am. Dec. 155, and note discussing this subject; *Tassey v. Church*, 39 Id. 65; *Newall v. Hussey*, 36 Id. 17; *Perrin v. Keene*, Id. 759; *Murray v. Hay*, 43 Id. 773; *McVicar v. Beedy*, 50 Id. 666; *Pridgin v. Strickland*, 58 Id. 124, and cases cited in the notes thereto. To the point that an amendment introducing a new cause of action cannot be allowed, the principal case is cited in *Van Sickles v. Perry*, 3 Robt. 622. So it is cited to the point that an amendment adding new parties, in whose favor a cause of action exists, where the original plaintiff has no cause of action, is improper, in *State v. Rottakrn*, 34 Ark. 158; *People v. Ingersoll*, 67 Barb. 484; *Woodruff v. Dickie*, 5 Robt. 623; S. C., 31 How. Pr. 168; *Smith v. Rathbun*, 22 Hun, 156. So an amendment striking out the name of the original plaintiff, and inserting the name of a new one: *Loventhall v. Wiseman*, 56 Barb. 492; or an amendment substituting entirely new defendants: *Shaw v. Cock*, 12 Hun, 176. The case is cited also in *Beckwith v. Griswold*, 29 Barb. 295, to the point that an amendment in furtherance of justice at the trial is always proper. In *Bank of Havana v. Magee*, 20 N. Y. 361, the case is distinguished as not precluding an amendment, substituting the name of an individual banker as plaintiff, where he has sued under a corporate name, under which he has been accustomed to transact business, since the nature of the litigation is not thereby changed. It is distinguished also in *Van Duzer v. Howe*, 21 Id. 539, as not preventing an amendment in a suit by the president of a bank, upon a bill adding an omitted averment of

the negotiation of the bill to the bank. In *Newman v. Marvin*, 12 Hun, 233, the construction given by the court in the principal case to section 122 of the New York code of civil procedure is quoted with approval.

THAT LAWFUL ACT CANNOT BE NUISANCE is a point to which the principal case is cited in *People v. Kerr*, 37 Barb. 418; *Masterson v. Short*, 7 Robt. 242; S. C., 3 Abb. Pr., N. S., 155.

CLARKE v. ROCHESTER & SYRACUSE R. R. Co.

[14 NEW YORK (4 KERNAN), 570.]

RAILROAD COMPANY ACTING AS COMMON CARRIER OF ANIMALS is not liable for their dying or being injured from causes arising from their animal nature and propensities, and which diligent care could not have prevented; but is liable, in the absence of special agreement or proof of inevitable accident, for loss or damage which might have been avoided by use of care and foresight, whether due to conduct of the animals themselves or to incidents of the company business.

APPEAL from a judgment against a railroad company for the death of a horse intrusted to them for transportation. The proof showed that the plaintiff intrusted horses to defendants to be carried by rail, passage for plaintiff over the same trip being embraced in the contract. Plaintiff, however, went by another train. On arrival of the train at the place of destination one of the horses was found to have died on the way. Witnesses differed whether the death was attributable to defective construction of the car. The judge refused a nonsuit, and the plaintiff had verdict and judgment, which the full court sustained, and defendants appealed,

E. G. Lapham, for the appellants.

F. Kernan, for the respondent.

By Court, DENIO, C. J. The fact that the plaintiff was allowed a passage for himself on the train in which his horses were carried did not prove conclusively, if at all, that he was to attend to their safety during the journey. It may very well be that he desired to be present at the time and place of delivery, in order to take care of them there, and that the privilege of taking passage in the same train was allowed him for that purpose. The charge which permitted the jury to find an agreement which would relieve the defendants from the obligation to keep an oversight of the animals was as favorable to them as they could require.

As to the carrier's liability respecting the transportation of

this sort of property, several theories have been suggested on the argument and in our consultations upon this case.

The plaintiff contends for the rule that the carrier is bound to transport in safety and deliver at all events, save only the known cases in which a carrier of ordinary chattels is excused; while the defendants maintain that they are not insurers at all against the class of accidents which arise from the vitality of the freight. We are of opinion that neither of these positions is well taken. A bale of goods or other inanimate chattel may be so stowed as that absolute safety may be attained, except in transportation by water, where the carrier usually excepts the perils of the navigation, and except in cases of inevitable accident. The rule, established from motives of policy, which charges the carrier in almost all cases, is not, therefore, unreasonable in its application to such property. But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss. The reasons stated by Chief Justice Marshall, in pronouncing the judgment of the supreme court of the United States, in *Boyce v. Anderson*, 2 Pet. 150, have considerable application to this case. It was there held that the carrier of slaves was not an insurer of their safety, but was liable only for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he has over inanimate matter. Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach.

Pulmer v. Grand Junction Railway Company, 4 Mee. & W. 749, was the case of an action against a railway company for negligence in carrying horses, by which one was killed and others injured; but the damage was occasioned by the carriages running off the track of the road down an embankment, and the case did not turn at all on the peculiarity of the freight, but mainly on the question whether the defendants had limited their responsibility by a notice. The jury found that notice had not

been given, and that the defendants had been guilty of gross negligence. Mr. Baron Parke, in giving the opinion of the court, declared that the common-law duty of carriers was cast upon the defendants. The precise question now before us was not discussed, but it was assumed that the law of carriers applied to the case. There is no reason why it should not, in all cases of accident unconnected with the conduct of the animals. But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee for hire of animals is bound to exercise, and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule, and considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exception requires.

We cannot, therefore, assent to the position of the counsel for either of the parties in this case. The learned judge who tried this case gave to the jury the true principle of liability in such cases. Laying out of view the idea of inevitable accident, which it was not pretended had occurred, he instructed them that the defendants were responsible, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not, by the exercise of diligence and care, have prevented. This accords with our understanding of the law.

There was sufficient evidence of negligence to be submitted to the jury. Besides what was said by the witnesses as to the size of the car, it was quite probable that if a proper watch had been kept, the horse would have been saved from strangulation. It was for the jury to say whether prudence did not require that a servant of the defendants should have been stationed in or about the horse-car, so as to observe the conduct and condition of the animals constantly or at short intervals.

We think no error was committed on the trial to the prejudice of the defendants, and that the judgment should be affirmed.

Judgment accordingly.

LIABILITY OF CARRIERS OF LIVE ANIMALS.—There has been some controversy upon the point as to whether or not the liability of carriers of living animals is that of common carriers. The controversy has arisen from the fact that, until recent times, property of this nature was not ordinarily a subject of transportation by land, and therefore the common-law rule respecting the liability of common carriers has been thought by some not to be applicable to such transportation.

CASES IN WHICH LIABILITY OF SUCH CARRIERS HELD NOT TO BE THAT OF COMMON CARRIERS.—In several English cases it has been doubted whether the common-law rule as to the liability of common carriers applied to carriers of live animals: *Pardington v. South Wales R. Co.*, 1 H. & N. 392; S. C., 26 L. J. C. P. 105; 2 Jur., N. S., 1210; *McManus v. Lancashire etc. R. Co.*, 2 H. & N. 693; S. C., 27 L. J. Ex. 201; 4 Jur., N. S., 144. But in other cases the common-law rule of liability has been held to be applicable, in the absence of a special contract limiting the liability: *Palmer v. Grand Junction R. Co.*, 4 Mee. & W. 749; S. C., 7 Dow. P. C. 232; 1 H. & H. 489; 3 Jur. 559. And the question has been substantially put at rest in that country by statute. In a number of American cases, also, the common-law rule of liability has been denied. Thus, it seems to have been established in Michigan that railroad companies engaged in transporting cattle for hire are not liable therefor as common carriers, except where by express contract, or by holding themselves out to the public as common carriers of such property, they have assumed such liability: *Michigan etc. R. R. Co. v. McDonough*, 21 Mich. 165; S. C., 4 Am. Rep. 466; *Lake Shore etc. R. R. Co. v. Perkins*, 25 Mich. 320; S. C., 12 Am. Rep. 275. It is held, therefore, in those cases, that in the absence of any such express contract, or "holding out," such carriers are not bound to carry live-stock at all, or otherwise than upon such terms as they may think proper to demand. Those cases further decide that in order to make the carrier liable for the transportation of live-stock as a common carrier, the burden of proof is upon the shipper to show an express or tacit undertaking by the carrier to assume that liability; and that it is not sufficient merely to show a custom by the carrier to transport such property for hire upon terms varying from those applicable to common carriers. The opinion of Mr. Justice Christiancy upon this subject, in *Michigan etc. R. R. Co. v. McDonough*, *supra*, is very able and elaborate, and will well repay perusal. In a few other American cases it has been decided that carriers of such property are not liable as common carriers, though they are bound to a very high degree of diligence and care: *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 645; S. C., 15 Am. Rep. 740; *Indianapolis etc. R. R. Co. v. Jurey*, 8 Ill. App. 160. In those cases, however, the result of the rule applied was practically the same as if the common-law rule had been adopted.

GENERAL RULE OF CASES is that the liability of carriers of live animals is the common-law liability of common carriers of other property. The rule in some of the cases is stated in general terms, without express qualification: *Palmer v. Grand Junction R. Co.*, 4 Mee. & W. 749; S. C., 7 Dow. P. C. 742; 1 H. & H. 489; 3 Jur. 559; *St. Louis etc. R. Co. v. Dorman*, 72 Ill. 504; *Kansas etc. R. Co. v. Reynolds*, 8 Kan. 623; *Kansas etc. R. Co. v. Nichols*, 9 Id. 235; S. C., 12 Am. Rep. 494; *Philadelphia etc. R. R. Co. v. Lehman*, 56 Md. 209; *Evans v. Dunbar*, 117 Mass. 546; *Ritz v. Pennsylvania R. R. Co.*, 3 Phila. 82; *Porterfield v. Humphries*, 8 Humph. 497; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247. But as generally laid down, the rule is, that the carrier is liable in such cases, unless otherwise stipulated by contract, to the same extent as common carriers of other property except for losses occasioned

without the carrier's neglect, by the vitality of the freight, that is to say, except for losses arising from their nature and propensities to injure themselves or each other: *Lawson on Carriers*, 16, 17; *Angell on Carriers*, secs. 214 et seq.; *Hutchinson on Carriers*, secs. 217 et seq.; *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; S. C., 23 Am. Rep. 578; *Georgia R. R. v. Spears*, 66 Ga. 489; S. C., 42 Am. Rep. 81; *Georgia R. R. v. Beatie*, 66 Ga. 438; S. C., 42 Am. Rep. 75; *McCoy v. Keokuk etc. R. R. Co.*, 44 Iowa, 424; *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 533; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142; S. C., 15 Am. Rep. 19; *Moulton v. St. Paul etc. R. Co.*, 31 Minn. 85; S. C., 47 Am. Rep. 791; *Rixford v. Smith*, 52 N. H. 355; S. C., 13 Am. Rep. 42; *Mynard v. Syracuse etc. R. Co.*, 71 N. Y. 180; S. C., 27 Am. Rep. 23; *Bamberg v. South Carolina etc. R. R. Co.*, 9 S. C. 61; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180, and other cases hereinafter cited. This, it will be perceived, is substantially the rule laid down in the principal case. Practically, it matters little whether it be said that the carriers of such freight are liable to the same extent as common carriers of other property, or whether the rule be stated, as in the cases last cited, with the exception of losses arising from the inherent nature and propensities of the animal's character; for the exception is really a part of the rule. With respect to all kinds of property, it is well established that a common carrier is not liable for any loss arising from the infirmity of the article carried, as from the liability of fruit to decay, and the like: *Moulton v. St. Paul etc. R. R. Co.*, 31 Minn. 85; S. C., 47 Am. Rep. 791; *Bamberg v. South Carolina etc. R. R. Co.*, 9 S. C. 61. This general and well-settled exception unquestionably covers the case of animals lost, destroyed, or injured in transportation by their own vices or infirmities. There is much truth, indeed, in the observation of Mr. Justice Willes, in *Blower v. Western R. Co.*, L. R. 7 C. P. 655; S. C., 41 L. J. C. P. 268; 27 L. T., N. S., 883; 20 W. R. 776, that the conflict of opinion found in the authorities respecting the liabilities of carriers of animals "may turn out after all to be a mere controversy of words." In most cases it will be found that whatever may be the form of the rule laid down upon this subject the carrier will be held liable under the same circumstances.

The notion that carriers of live animals are not to be held liable as common carriers, at common law, because such property was not originally a subject of land transportation, is entirely fallacious. The liability of the common carrier does not, and never did, depend upon the nature of the articles carried, but upon the nature of the business: *Bamberg v. South Carolina R. R. Co.*, 9 S. C. 67; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 188. The carrier was made an insurer of the safety of the articles transported, upon general grounds equally applicable to all classes of property. To say that the common-law rule did not apply to the carriage of animals because such carriage was "unknown to the common law," is as absurd as to say that it does not apply to the transportation of pianos because that too was unknown to the common law: *Maslin v. Baltimore etc. R. R. Co.*, *supra*. The only well-established exception to the general rule of liability of common carriers, founded upon the nature of the property, is that of the transportation of slaves, as to which the rule was, while that class of property was recognized, that the liability of the carriers of such property was that of a passenger carrier: *Boyce v. Anderson*, 2 Pet. 150; *Williams v. Taylor*, 4 Port. 238; *Clark v. McDonald*, 4 McCord, 223. That exception, however, was the result of the anomalous doctrine of property in man. It was a concession that though a man might be property, he was "a man for a' that."

The only one of the United States which has distinctly and unequivocally
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rejected the doctrine that carriers of animals are liable as common carriers, in the absence of an express contract limiting liability, is Michigan. The doctrine in that state is accounted for by Valentine, J., in *Kansas etc. R. Co. v. Nichols*, 9 Kan. 235, S. C., 12 Am. Rep. 496, by the suggestion that since April, 1870, railroads have not there been regarded as a "public use," as held in *People v. Sulem*, 20 Mich. 452; S. C., 4 Am. Rep. 400. The Michigan courts do not, however, put the doctrine upon any such ground. Indeed, if this were the explanation, it is not easy to see why the rule should not be extended so as to exempt railroad companies from liability as common carriers of every kind of property.

EXCEPTION THAT CARRIER OF LIVE ANIMALS IS NOT LIABLE FOR LOSS FROM NATURE OR PROPENSITIES of the animals themselves, where he has been guilty of no negligence occasioning the loss, as for injuries from unruliness, restiveness, fright, viciousness, refusal to eat, or the like, is well settled, and has been often applied: *Nugent v. Smith*, L. R. 1 C. P. Div. 423; S. C., 45 L. J. C. P. 697; 34 L. T., N. S., 827; 25 W. R. 117, reversing S. C., L. R. 1 C. P. Div. 19; S. C., 45 L. J. C. P. 19; 33 L. T., N. S., 731; 24 W. R. 237; *Kendall v. London etc. R. Co.*, L. R. 7 Ex. 373; S. C., 41 L. J. Ex. 184; 26 L. T., N. S., 735; 20 W. R. 880; *Blower v. Great Western R. Co.*, L. R. 7 C. P. 655; S. C., 41 L. J. C. P. 268; 27 L. T., N. S., 883; 20 W. R. 776; *Chicago etc. R. Co. v. Harmon*, 12 Ill. App. 54, 63; *Indianapolis etc. R. Co. v. Jurey*, 8 Id. 160; *Wabash etc. R. Co. v. McCusland*, 11 Id. 491; *Illinois etc. R. Co. v. Brelsford*, 13 Id. 251; *Hall v. Renfro*, 3 Metc. (Ky.) 51; *Smith v. New Haven etc. R. Co.*, 12 Allen, 531; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142; S. C., 15 Am. Rep. 19; *Penn v. Buffalo etc. R. Co.*, 49 N. Y. 204; S. C., 10 Am. Rep. 355; *Croyin v. New York etc. R. R. Co.*, 51 N. Y. 61; S. C., 10 Am. Rep. 559; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180. Thus the carrier is not liable where a bullock escapes, by his own exertions, from the truck in which he is being transported, without negligence by the carrier, the truck itself being sufficient, and is lost: *Blower v. Great Western R. Co.*, L. R. 7 C. P. 655; S. C., 41 L. J. C. P. 268; 27 L. T., N. S., 883; 20 W. R. 776. So where the animal takes fright, after the journey is ended, at a light displayed by a servant of the company, and dashes upon the track and is killed: *Roberts v. Great Western R. Co.*, 4 Ad. & El., N. S., 506. So where an unruly jackass is thrown off or falls off a ferry-boat, through his own restlessness or viciousness, the ferry-man, if not guilty of negligence, is not liable: *Hall v. Renfro*, 3 Metc. (Ky.) 55. So where a mule, being transported in a railway car, kicks through the slats at the side of the car and is killed, without fault of the carrier, there is no liability, it being the nature of the mule to kick: *Indianapolis etc. R. Co. v. Jurey*, 8 Ill. App. 160. Nor is the carrier liable where one of a pair of horses kicks and kills or injures the other in the car, if the car was suitable, and proper care was exercised to prevent such injuries: *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142; S. C., 15 Am. Rep. 19. So where an animal dies or is injured by heat or cold or want of food while in course of transportation, without any negligence on the part of the carrier, there can be no recovery therefor: *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; *Kirby v. Great Western R. Co.*, 18 L. T., N. S., 658.

Where an animal while being carried perishes, partly through its own unruly conduct and partly from the effects of a storm, the carrier, if not chargeable with negligence, is not liable: *Nugent v. Smith*, L. R. 1 C. P. Div. 423; S. C., 45 L. J. C. P. 697; 34 L. T., N. S., 827; 25 W. R. 117.

IF CARRIER'S NEGLIGENCE CONTRIBUTES TO LOSS through the infirmity or unruliness of the animal carried, the carrier is liable therefor. Thus,

although as already stated, the carrier is not liable for the death or injury of an animal by heat, in the absence of negligence, yet where hogs become heated in the course of transportation by being overcrowded, and the carrier upon being informed of the fact neglects to apply water to them, it is liable for an injury resulting therefrom, and it is no excuse that the carrier's pump is out of repair: *Illinois etc. R. R. Co. v. Adams*, 42 Ill. 474; *Toledo etc. R. R. Co. v. Thompson*, 71 Id. 434. So the carrier is also liable for a loss occasioned by the overcrowding of sheep in an insufficient car: *Ritz v. Pennsylvania R. R. Co.*, 3 Phila. 82. And generally, it is the duty of the carrier to provide cars of sufficient size and strength for the transportation of animals; and if it fails to do so it is liable for a loss occasioned thereby through the unruliness of the animals: *St. Louis etc. R. Co. v. Dorman*, 72 Ill. 504; *Indianapolis etc. R. Co. v. Strain*, 81 Id. 504; *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 531; *Rhodes v. Louisville etc. R. Co.*, 9 Bush, 688. The rule on this point is thus stated by Mr. Justice Foster in *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 534: "The sufficiency of a car door to resist the struggles of animals, however unruly, it is in the power of a railroad company to secure. And its obligation in this respect is not satisfied by furnishing a reasonably strong car. The company is bound to have one absolutely and actually sufficient. It is practicable to make a car so thoroughly strong that cattle cannot break it down and fall out. For any failure to do so the carrier is responsible." The obligation to furnish safe and suitable cars is absolute, without reference to the fitness and fidelity of the company's servants, unless the shipper of the animals voluntarily assents to the use of cars which he knows to be defective: *Great Western R. Co. v. Hawkins*, 18 Mich. 427; S. C., 17 Id. 57. So, though the contract which limits the liability of the carrier in some respects is silent as to the fitness of the cars: Id. Even where the defect in the cars is known to the shipper at the time of shipment, it is held that the carrier is liable for an injury resulting therefrom, in the absence of any stipulation to the contrary: *Pratt v. Ogdensburg etc. R. R. Co.*, 102 Mass. 557. Certainly the mere presence of the owner of the animals will not limit the carrier's responsibility for an injury from this cause, where he has no control over the cars and is not permitted to take precautions which he suggests for the safety of the animals; as where box-cars are used instead of cattle-cars for the transportation of cattle, and the owner of the cattle is refused the privilege of nailing slats across the doors; and solid doors being used, the animals are suffocated: *Peters v. New Orleans etc. R. R. Co.*, 16 La. Ann. 222. Where the carrier has limited its liability to the end of its road, but carries the cattle beyond, and they there escape, owing to defects in the cars, it is liable for the loss: *Indianapolis etc. R. Co. v. Strain*, 81 Ill. 504. A connecting carrier is not bound to transport animals in the same cars in which they were received: *McAlister v. Chicago etc. R. R. Co.*, 74 Mo. 351; but if it uses the same cars it is liable for injuries from defects therein to the same extent as if they were its own cars: *Combe v. London etc. R. Co.*, 31 L. T., N. S., 613. Even where it is denied that carriers of animals are liable as common carriers, it is held that they are liable for injuries from neglect to furnish proper cars for the transportation: *Michigan etc. R. R. Co. v. McDonough*, 21 Mich. 163; S. C., 4 Am. Rep. 466. A railway company transporting pigs in cars which have been washed with lime, and have not been properly cleaned, is liable for an injury resulting therefrom, although the lime-wash was used in obedience to a government regulation: *Shaw v. Great Southern etc. R. Co.*, 8 L. R. Ir. 10.

The rule that a carrier is not exempted from liability for an injury resulting to animals transported by him, through their own restlessness or vicious-

ness, where his own negligence in not providing proper appliances, etc., has contributed thereto, extends also to ferry-men. Hence, owners of a ferry who have not provided their boat, or the slip leading thereto, with proper railings, bars, chains, or the like, are liable for the loss of animals plunging off the boat or slip through restlessness or fright: *Wilson v. Hamilton*, 4 Ohio St. 722; *Willoughby v. Horridge*, 12 Ad. & El., N. S., 742; S. C., 22 L. J. C. P. 90; 17 Jur. 323.

IF OWNER OF ANIMALS OR HIS AGENT CONTRIBUTES TO THEIR LOSS OR INJURY by his own act or negligence, he cannot recover therefor against the-carrier: *Pratt v. Oydensburg etc. R. R. Co.*, 102 Mass. 557; *Illinois etc. R. R. Co. v. Brelsford*, 13 Ill. App. 251. Thus, where the owner of horses transported by rail is guilty of negligence in fastening their halters and in not removing their shoes, so that one kicks the other, the carrier is not liable: *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142; S. C., 15 Am. Rep. 19. So, where the owner of a greyhound furnishes an insufficient strap and collar, by reason of which it escapes from the carrier and is killed in course of transportation, it is held that he cannot recover: *Richardson v. North-eastern R. Co.*, L. R. 7 C. P. 75; S. C., 41 L. J. C. P. 60; 26 L. T., N. S., 131; 20 W. R. 461, distinguishing *Stewart v. Crawley*, 2 Stark. 323, which was a somewhat similar case. So the carrier is not liable where the owner or his agent insists on putting an animal on board the cars as he thinks best, after being requested to surrender its control to the-carrier, and an injury results during the loading: *Bowie v. Baltimore etc. R. R. Co.*, 1 McArthur, 94. So it is held that it is not necessarily negligence on the part of a carrier by water to confine cattle between the decks of an iron ship during hot weather, where that is the act of the shipper: *The Powhatan*, 21 Blatch. 18. And where the owner or his agent unwarrantably interferes with the management of the animal during transportation, by refusing to allow the car door to be shut, so that the animal falls out and is killed, the carrier is not liable: *Roderick v. Baltimore etc. R. R. Co.*, 7 W. Va. 54. And where the owner of a team on a ferry-boat keeps control of it himself, and is guilty of negligence in its management, so that the animals, becoming frightened, rush overboard, it is held that he cannot recover therefor, although the boat is not provided with sufficient chains, or the like: *White v. Winnissimmit Co.*, 7 Cush. 155; *Dudley v. Camden etc. Ferry Co.*, 42 N. J. L. 25; S. C., 36 Am. Rep. 501; S. C., 45 N. J. L. 368. But in *Willoughby v. Horridge*, 12 Ad. & El., N. S., 742; S. C., 22 L. J. C. P. 90; 17 Jur. 323, the lessees of a ferry were held liable for an injury to a passenger's horse by the giving way of the side rail of the landing-slip, although the passenger had control of the animal, they having had previous notice of the insufficiency of the side rail. The mere fact that the owner of an animal accompanies it, and exercises care respecting it *in transitu*, will not exempt the carrier from liability for negligence: *Moulton v. St. Paul etc. R. Co.*, 31 Minn. 85; S. C., 47 Am. Rep. 781; nor will the presence and assistance of the owner's servant while animals are being unloaded relieve the carrier of responsibility with respect thereto: *Combe v. London-etc. R. Co.*, 31 L. T., N. S., 613.

NEGLECT BY OWNER TO INFORM CARRIER of animals shipped through another state that they are of a kind not permitted by the laws of that state to be unloaded there will, together with other circumstances, prevent his recovering from the carrier a fine which he is compelled to pay for the carrier's act in unloading the animals in that state for transshipment against his, the owner's, remonstrance: *McAlister v. Chicago etc. R. R. Co.*, 74 Mo. 351. Although, however, the owner of an animal transported by a common carrier

may be negligent in not communicating proper information to the carrier, it will not prevent recovery for an injury due entirely to the carrier's negligence. Thus, where the shipper of a pregnant cow neglects to inform the carrier of her condition, and that extraordinary care must be taken of her, it will not exempt the carrier from liability for a loss resulting from negligently permitting the car to run down the grade and to strike with great force against another car; for the shipper's negligence does not contribute thereto: *McCune v. Burlington etc. R. Co.*, 52 Iowa, 600.

LIABILITY FOR REFUSAL TO CARRY ANIMALS OR DELAY IN THEIR TRANSPORTATION.—As carriers of animals for hire are common carriers, they are unquestionably bound to carry such freight on reasonable terms for all if they are provided with the facilities for doing so, and are liable in damages for a refusal to carry without reasonable excuse: *Chicago etc. R. Co. v. Erickson*, 91 Ill. 613; *Ballentine v. North Missouri R. R. Co.*, 40 Mo. 491; *Texas etc. R. Co. v. Nicholson*, 61 Tex. 491. An unconstitutional statute forbidding the transportation is not a reasonable excuse: *Chicago etc. R. Co. v. Erickson*, 91 Ill. 613. It is held, however, in Michigan, in accordance with the doctrine of that state already adverted to, that unless a railway company has held itself out as a common carrier of animals it is not liable for a refusal to carry them: *Lake Shore etc. R. R. Co. v. Perkins*, 25 Mich. 329; S. C., 12 Am. Rep. 275. As a common carrier of animals is liable for a refusal to carry them on reasonable terms, it is also liable for unreasonable delay in shipment and for damages arising therefrom: *Wabash etc. R. Co. v. McCasland*, 11 Ill. App. 491; *Illinois etc. R. R. Co. v. Waters*, 41 Ill. 73; *Tucker v. Pacific R. R. Co.*, 50 Mo. 385; *Sturgeon v. St. Louis etc. R. Co.*, 65 Id. 569. Thus if cattle are placed on board the company's cars in season for the next regular cattle train, and information thereof given to the station-agent, the company is liable for damages occasioned by not forwarding them by that train: *Illinois etc. R. R. Co. v. Waters*, 41 Ill. 73. But the carrier is not liable if the cattle are not on board the cars when the train arrives: *Frazier v. Kansas etc. R. Co.*, 48 Iowa, 571. The lack of suitable appliances, it seems, is no excuse for delay of shipment, as where the engine attached to the train, by which swine ought to have been shipped, threw out sparks when drawing a heavy load, and was thus likely to set the straw in the hog-cars on fire: *Tucker v. Pacific R. R. Co.*, 50 Mo. 385. Where delay in shipment is excused, the carrier is not, of course, liable for any damage resulting from such delay, nor it seems, where there is no stipulation to carry by a particular train or in season for a particular market-day: *Conger v. Hudson R. R. Co.*, 6 Duer, 375. The carrier is liable also for unreasonable delay in transshipment over a connecting road: *Toledo etc. R. Co. v. Lockhart*, 71 Ill. 627. So for unreasonable or negligent detention of the train, whereby animals perish of cold, the carrier is liable: *Moulton v. St. Paul etc. R. Co.*, 31 Minn. 85; S. C., 47 Am. Rep. 781.

LIMITATION OF LIABILITY OF CARRIERS OF LIVING ANIMALS BY CONTRACT. A common carrier may unquestionably limit his liability for the transportation of living animals by express contract, in consideration of a reduced freight, except as to injuries occasioned by its own negligence or misfeasance: *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; S. C., 23 Am. Rep. 578; *Georgia R. R. Co. v. Beatie*, 66 Ga. 438; S. C., 42 Am. Rep. 75; *Georgia R. R. Co. v. Spears*, 66 Ga. 485; S. C., 23 Am. Rep. 578; *Mitchell v. Georgia R. R. Co.*, 63 Ga. 644; *Illinois etc. R. R. Co. v. Morrison*, 19 Ill. 136; *Dawson v. St. Louis etc. R. Co.*, 76 Mo. 514; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; *Betts v. Farmers' etc. Co.*, 21 Wis. 80; *Morrison v. Phillips etc. Co.*, 44 Id. 405. Thus it may stipulate

against loss by overcrowding, heat, suffocation, and the like: *Squire v. New York etc. R. R. Co.*, 93 Mass. 233; *Georgia R. R. v. Beatie*, 66 Ga. 438; S. C., 42 Am. Rep. 75; *Mitchell v. Georgia R. R. Co.*, 68 Ga. 644. And such stipulation is especially binding where the owner of the animals or his agent has notice of the danger of loss from the causes mentioned in time to prevent it: *Squire v. New York etc. R. R. Co.*, *supra*. So the carrier may provide in the contract that it will not be liable for any loss, unless notice thereof is given within a specified time: *Wabash etc. R. Co. v. Black*, 11 Ill. App. 463; *Dawson v. St. Louis etc. R. Co.*, 76 Mo. 514; *Goggin v. Kansas etc. R. Co.*, 12 Kan. 416. But in *Ormsby v. Union Pacific R. Co.*, 2 McCrary, 48, it was held that a contract between the carrier and shipper, that the former was not to be liable for delay of transportation, and requiring notice of a claim for damages to be given before the stock were unloaded, was unreasonable and void; especially as applied to an injury from illness, which would probably not be discoverable before removal of the animals from the cars. A provision in the contract for the carriage of cattle by sea against liability for loss by jettison, where they are shipped on deck, is not unreasonable or against public policy: *The Enrique*, 5 Hughes, 275.

A limitation of liability to fifty dollars a head for cattle shipped by rail in a carrier's contract, in consideration of a reduction in freight, was held reasonable in *South R. R. Co. v. Henlein*, 52 Ala. 606; S. C., 23 Am. Rep. 578. To the same effect is *Hart v. Pennsylvania R. R. Co.*, 2 McCrary, 333. But in *Chicago etc. R. Co. v. Harmon*, 12 Ill. App. 54, a custom of a carrier not to be responsible for an injury to any animal exceeding the value of one hundred dollars was declared void, as against public policy: See also *Moulton v. St. Paul etc. R. Co.*, 31 Minn. 85; S. C., 47 Am. Rep. 781. And in *McCune v. Burlington etc. R. Co.*, 52 Iowa, 600, a regulation by the carrier to the effect that no valuable stock should be received for transportation until the owner should sign a contract releasing the company from all liability for anything beyond the value of ordinary stock, was adjudged void under section 1308 of the Iowa code. Whatever may be the value of an animal, the same degree of care is required of the carrier transporting it, and if the carrier has any special rules whereby care is to be proportioned to the value of the animal, it is his duty to inquire of the shipper whether such animal possesses any special value: *Chicago etc. R. Co. v. Harmon*, 12 Ill. App. 54. As to the effect of negligence on the part of the carrier, where there is a contract limiting the liability to a specified value, and as to limitations of the recovery to a particular value under the English railway and canal traffic act, see *post*. We have no doubt that, in accordance with the general rule as to the liability of carriers for articles of exceptional value, a carrier may require shippers to state the value of animals having a special value above that of ordinary stock, and may require the payment of freight in proportion to the increased risk, unless the shipper will consent to the limitation of the liability to a specified value, where there is no negligence or misfeasance on the part of the carrier.

A carrier may also, no doubt, stipulate in a contract for the carriage of animals that the owner shall care for them in transit and see to the unloading of them to be fed, and the like: *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; S. C., 23 Am. Rep. 578. But although the owner agrees to take care of his stock and to see to the loading and unloading of them, the carrier must afford him reasonable opportunity and facilities for doing so: *Dawson v. St. Louis etc. R. Co.*, 76 Mo. 514; *Bills v. New York etc. R. R. Co.*, 84 N. Y. 5. But even where the contract provides that the carrier shall furnish proper facilities and assistance in unloading and feeding cattle, it seems that if the owner neglects

to unload and feed them without help, where he might have done so by furnishing his own appliances, he cannot recover for a loss occasioned by the carrier's failure to provide the facilities and assistance stipulated for: *Penn v. Buffalo etc. R. R. Co.*, 49 Id. 204. On the other hand, although the contract stipulates that the carrier shall not be liable for attention, feeding, etc., but that it shall afford the shipper reasonable facilities for caring for his animals himself, the carrier is nevertheless liable for failure to care for them, where it carries them beyond their destination, and detains them several days: *Bryant v. South-western R. R. Co.*, 68 Ga. 805. And notwithstanding such a stipulation in the contract, the carrier is bound to have stock unloaded and fed at a junction with a connecting line, where upon arrival there it is found that the stock cannot be forwarded immediately: *Dunn v. Hannibal etc. R. R. Co.*, 68 Mo. 268.

A carrier of animals cannot stipulate against liability for negligence in respect of its duties as a common carrier: *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; S. C., 23 Am. Rep. 578; *Georgia R. R. v. Beatie*, 66 Ga. 438; S. C., 42 Am. Rep. 75; *Indianapolis etc. R. R. Co. v. Allen*, 31 Ind. 394; *St. Louis etc. R. R. Co. v. Piper*, 13 Kan. 505; *Kansas etc. R. R. Co. v. Simpson*, 30 Id. 645; S. C., 46 Am. Rep. 104; *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 445; S. C., 15 Am. Rep. 740; *Moulton v. St. Paul etc. R. Co.*, 31 Minn. 85; S. C., 47 Am. Rep. 781; *Oxley v. St. Louis etc. R. R. Co.*, 65 Mo. 629; *Sturgeon v. St. Louis etc. R. R. Co.*, Id. 569; *Dunn v. Hannibal etc. R. R. Co.*, 68 Id. 268; *Welsh v. Pittsburgh etc. R. R. Co.*, 10 Ohio St. 65; *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 414; *Virginia etc. R. R. Co. v. Sayers*, 26 Gratt. 328. *Contract* in New York: *Crayin v. New York etc. R. R. Co.*, 51 N. Y. 61; *Mynard v. Syracuse etc. R. R. Co.*, 71 Id. 180. And where the contract is not to be liable for anything but gross negligence, the carrier is nevertheless liable if it is guilty of any negligence occasioning a loss: *Virginia etc. R. Co. v. Sayers*, *supra*. In some of the cases it is said that although the carrier, in such a case, cannot by contract exempt itself from liability for any loss occasioned by neglect of its duties as a common carrier in running its trains, etc., it may limit its liability for negligence in other respects: *Georgia R. R. Co. v. Beatie*, 66 Ga. 438; S. C., 42 Am. Rep. 75; *Georgia R. R. Co. v. Spears*, 66 Ga. 485; S. C., 42 Am. Rep. 81. Where the contract limits the carrier's liability for an animal to a certain sum, the better opinion is that the limitation does not apply where the loss is occasioned by negligence: *Kansas etc. R. R. Co. v. Simpson*, 30 Kan. 644; S. C., 46 Am. Rep. 104; but see, *contra*, *Hart v. Pennsylvania R. R. Co.*, 2 McCrary, 333. Permitting straw or other combustible materials to be used in stock-cars, whereby a fire originates from sparks from the locomotive, is such negligence as to render the carrier liable, notwithstanding any stipulation to the contrary: *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 414. So leaving a car window open, or any like negligence, whereby animals escape from a car, will render the carrier liable, although the contract expressly stipulates against liability for escapes: *Indianapolis etc. R. R. Co. v. Allen*, 31 Ind. 394; *Oxley v. St. Louis R. R. Co.*, 65 Mo. 629. And where the contract stipulates against liability for suffocation of animals the carrier is nevertheless liable for an injury from that cause through its own negligence: *Sturgeon v. St. Louis R. R. Co.*, Id. 569. So the carrier is liable for an injury from delay caused by negligence, though the contract stipulates against liability for delay generally: *Dunn v. Hannibal etc. R. R. Co.*, 68 Mo. 268; *Wabash etc. R. Co. v. McCasland*, 11 Ill. App. 491.

The carrier is bound also to furnish sufficient and suitable cars for the transportation of any animals which it undertakes to transport, notwithstand-

ing any stipulation to the contrary, and is liable for any injury occasioned by defects in the cars, rendering them unsafe, or the like: *Rhodes v. Louisville etc. R. R. Co.*, 9 Bush, 688; *Welsh v. Pittsburyh R. R. Co.*, 10 Ohio St. 65. But see, to the contrary, *Wilson v. New York etc. R. R. Co.*, 27 Hun, 149; *Chippendale v. Lancashire etc. R. R. Co.*, 7 Eng. L. & Eq. 395. And where the car originally provided proves defective, and the animals are changed to another, which the owner of the animals has no opportunity to supply with sufficient bedding, and an injury happens from want thereof, the carrier is liable although the contract provides that the owner is to take care of the animals: *McDaniel v. Chicago etc. R. R. Co.*, 24 Iowa, 412. Even where the carrier of animals is not regarded as a common carrier, it seems that it cannot relieve itself by special contract against liability for a loss arising from "negligence, misconduct, or otherwise," in "loading, unloading, conveyance, and otherwise," from the duty of furnishing suitable cars for the transportation, or from liability for a failure to do so: *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57.

In England it is provided by statute that railway companies may prescribe such conditions with respect to receiving, forwarding, and delivering animals "as shall be adjudged by the court, or a judge thereof, before whom any question relating thereto shall be tried, to be just and reasonable:" 17 & 18 Vict., c. 31, sec. 7. The same statute provides for a limitation of the liability of carriers of animals, beyond a certain sum per head; unless the value is declared and freight paid for the excess of value. Under this statute it is held that a condition in a contract for the carriage of animals, which was *prima facie* unreasonable, becomes just and reasonable if a reasonable alternative is offered to the shipper: *Corrigan v. Great Northern etc. R. Co.*, 6 L. R. Ir. 90; *Ruddy v. Midland etc. R. Co.*, 8 Id. 232; *Gallagher v. Great Western etc. R. Co.*, 8 Ir. C. L. 326. The burden of showing reasonableness of the condition in the contract or in the alternative contract is on the carrier: *Ruddy v. Midland etc. R. Co.*, *supra*. It is established, also, that a condition not to be liable for damage from over-carriage, detention, or delay, "however caused," is unjust and unreasonable: *Allday v. Great Western R. Co.*, 5 Best & S. 903; S. C., 34 L. J. Q. B. 5; 11 Jur., N. S., 12; 11 L. T., N. S., 267; 13 W. R. 43; *Kirby v. Great Western R. Co.*, 18 L. T., N. S., 658. So a condition exempting the carrier from "all liability," or from liability "in any case:" *Gregory v. West Midland R. Co.*, 2 H. & C. 944; S. C., 33 L. J. Ex. 155; 10 Jur., N. S., 243; 12 W. R. 528; *Lloyd v. Waterford etc. R. Co.*, 15 Ir. C. L. 37; S. C., 9 L. T., N. S., 89; *Ashendon v. London etc. R. Co.*, L. R. 5 Ex. Div. 190; S. C., 42 L. T., N. S., 586; 28 W. R. 511; 44 J. P. 203. So a condition that the owner shall assume all risk from negligence, default, or defects in the station or cars: *Rooth v. North-eastern R. Co.*, L. R. 2 Ex. 173; S. C., 36 L. J. Ex. 83; 15 L. T., N. S., 624; 15 W. R. 695; although, in some earlier cases, conditions exempting from "all liability," "all risk," and the like, were sustained as reasonable: *Gannell v. Ford*, 5 L. T., N. S., 604; *McConce v. London etc. R. Co.*, 7 H. & N. 477; S. C., 31 L. J. Ex. 65; 7 Jur., N. S., 1304; 10 W. R. 154; *Pardington v. South Wales R. Co.*, 1 H. & N. 392; S. C., 26 L. J. C. P. 105; 2 Jur., N. S., 1210; *Chippendale v. Lancashire etc. R. Co.*, 7 Eng. L. & Eq. 395; S. C., 21 L. J. Q. B. 22; 15 Jur., N. S., 1106.

The doctrine of the later English cases on this subject is in accord with that which prevails in most of the United States, that the carrier cannot exempt himself from liability for negligence in the transportation of animals by any condition in his contract. It is in accord, also, with the doctrine laid

down in the leading case of *Peek v. North Staffordshire R. Co.*, 10 H. L. C. 493, extensively quoted from in the note to *Cole v. Goodwin*, 32 Am. Dec. 498 et seq., to the effect that a carrier cannot in any case relieve himself by contract from liability for negligence. Where a carrier inserts a stipulation in his contract, under the statute in question not to be liable for injuries caused by the "kicking, plunging, or restiveness" of animals carried, it does not absolve him from responsibility for negligence in letting an animal out of the truck when excited, so that she jumped the fence, ran upon the track, and was killed: *Gill v. Manchester etc. R. Co.*, L. R. 8 Q. B. 186; S. C., 42 L. J. Q. B. 89; 28 L. T., N. S., 587; 21 W. R. 525. So a condition exempting from liability for injuries "caused by fear or restiveness of animals" will not excuse the carrier where an injury happens from fear or restiveness caused by the carrier's negligence, and not by the ordinary incidents of the transit: *Moore v. Great Northern R. Co.*, 10 L. R. Ir. 95. So a condition in an alternative contract, not to be accountable for the "correct selection of the owner's cattle on loading or unloading," is unreasonable, because it would exempt the carrier from liability for negligence: *McNally v. Lancashire etc. R. Co.*, 8 Id. 81. So a condition not to be liable "in any case" for the loss of an animal above a specified value, unless the value is declared, is unjust and unreasonable, because it would protect negligence and misconduct: *Ashendon v. London etc. R. Co.*, L. R. 5 Ex. Div. 190; S. C., 42 L. T., N. S., 586; 28 W. R. 511; 44 J. P. 203. The limitation under the statute in question, of the recovery for the loss or injury of an animal carried, to a particular sum, unless the value is declared, and insurance money paid thereon beyond the specified value, applies where there is no contract at all: *Hill v. London etc. R. Co.*, 42 L. T., N. S., 513; and also where there is an incomplete contract or incomplete delivery: *Hodgman v. West Midland R. Co.*, 5 Best & S. 173; S. C., 33 L. J. Q. B. 233; 10 Jur., N. S., 673; 10 L. T., N. S., 609; 12 W. R. 1054; S. C. affirmed, 35 L. J. Q. B. 85; 13 W. R. 758. Where the value is not intentionally "declared," but knowledge thereof is incidentally communicated or acquired, the carrier cannot refuse to carry unless the insurance money is paid, as provided in the act: *Robinson v. London etc. R. Co.*, 19 Com. B., N. S., 51; S. C., 34 L. J. C. P. 234, 14 Jur., N. S., 390; 13 W. R. 660. If a false declaration of value is made, it estops the shipper from proving any value beyond that: *McCance v. London etc. R. Co.*, 7 H. & N. 477; S. C., 31 L. J. Ex. 65; 10 W. R. 154; S. C., 3 H. & C. 343; 34 L. J. Ex. 39; 10 Jur., N. S., 1058; 11 L. T., N. S., 426; 12 W. R. 1086.

Further consideration of this subject, of the power of the carrier of animals to limit its liability therefor by express contract or notice, or the like, seems to be unnecessary, in view of the elaborate discussion of the general question of a common carrier's power to limit its liability in any case, contained in the note to *Cole v. Goodwin*, 32 Am. Dec. 495. If a carrier of animals is a common carrier, no reason is perceived why the power to limit liability in the transportation of such property is not the same as in case of any other kind of freight.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA

SAUNDERSON *v.* BALLANCE.

[2 JONES'S EQUITY, 322.]

PARTY CANNOT DISPUTE VALIDITY OF PURCHASE where, having the title to land which is offered for sale, and knowing his title, he stands by and encourages or does not forbid the sale, and thereby induces another to purchase under the supposition that he is getting a good title. Such purchaser is entitled to equitable relief in perfecting his title.

CAUSE in equity from Hyde county. Thomas Ballance, for the purpose of securing his creditors, made a trust deed of his land to one David Carter, who, by virtue of authority contained therein, on the fifteenth of June, 1853, by public sale sold the land in question to the plaintiff. Upon payment of the purchase money, plaintiff took a deed in fee without warranty from the trustee, he, the trustee, believing that the title to the land was good. Thomas Ballance became possessed of the land in controversy through a deed from his father, Caleb Ballance, sen., which deed, for want of words of inheritance, conveyed only a life estate in the land. Ballance, however, at the time of making the deed of trust, claimed the land in fee. Upon the death of the grantor, Caleb Ballance, sen., the reversion of this land descended to Thomas Ballance and one Joshua Ballance. On June 8, 1853, a few days before the sale by the trustee, Joshua Ballance conveyed his half of the reversion in fee to Caleb Ballance, jun., the defendant. After the trustee's sale, by permission of plaintiff, Thomas Ballance remained in possession of the land until his death, in December, 1853, when Caleb Ballance, jun., took possession of and still holds the same. Plaintiff, in January, 1854, demanded possession of

Caleb Ballance, jun., when he produced his deed from Joshua Ballance, and claimed one half of the land; said deed was not recorded until after the death of Thomas Ballance. The remaining facts appear in the opinion.

Shaw, for the plaintiff.

Rodman and Donnell, for the defendant.

By Court, BATTLE, J. The allegation of the bill, that at the time when the plaintiff purchased the land in question, and just before he made the purchase, he inquired of the former owner, Thomas Ballance, in the presence and hearing of the defendant, whether the title was good, and received an answer that it was (the defendant not disclosing his title), whereby the plaintiff was induced to purchase the land at a full and fair price, is rendered probable by the testimony taken in the cause; but the proof is not so full and satisfactory as to justify us in declaring the fact to be established. We might, therefore, in this state of the case, either direct a further inquiry to be made by the master, or order an issue to be tried by a jury, were we not satisfied that enough appears upon the pleadings to entitle the plaintiff to the relief which he seeks.

The defendant, in his answer, admits that, having ascertained that the deed under which his father claimed the land conveyed only an estate for life, and that his father owned one half only of the reversionary interest in fee, he purchased the other half from his uncle, Joshua Ballance, to whom it belonged; that this purchase was made a short time before the sale made by Carter, the trustee; that he was present at the sale and did not disclose his title, alleging as a reason for his silence that "he knew that before the sale the deed from Caleb Ballance, sen., to Thomas Ballance had been examined by the trustee; and the said trustee knew, or might have known, that said deed conveyed only a life estate; and because said trustee, in offering said land for sale, carefully and distinctly stated that it was only the estate of Thomas Ballance, whatever that might be, which was offered for sale; which the defendant thought was a sufficient caution for all purchasers to inquire for themselves." He stated, as a further reason, that though he thought it probable that the plaintiff "did not know the character of the deed from Caleb Ballance, sen., to Thomas Ballance, he might easily have known the same, as the said deed was duly registered in Hyde county, on the eleventh day of January, 1821, and the sale by said Carter had been advertised for several weeks before it took

place." The statement that Carter had examined the deed under which his grantor, Thomas Ballance, claimed, was expressly denied by him in his deposition taken for the defendant. On the contrary, he declared that he thought the title of his grantor was "undoubtedly good." The testimony of other witnesses shows clearly that inquiries were made of Thomas Ballance at the sale, whether his title to the land in question was good, and he answered, unhesitatingly, that it was. There can be no doubt, then, that the trustee thought he was selling an undisputed fee-simple title in the whole tract of land, and the bidders were laboring under the same impression.

Can the plaintiff, who purchased under these circumstances, have in this court the relief which he seeks? This question we will now proceed to answer. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, vol. 1, sec. 385, says: "In many instances a man may innocently be silent; for, as has been often observed, *aliud est tacere, aliud celare*. But in other cases a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. Thus if a man having a title to an estate which is offered for sale, and knowing his title stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate under the supposition that his title is good, the former so standing by, and being silent, will be bound by the sale; and neither he nor his privies will be at liberty to dispute the validity of the purchase." Among the cases upon which this doctrine was established is an early one, *Raw and Pole v. Pole*, 2 Vern. 239, decided in 1691, reported shortly after. "Leonard Pole, the defendant's elder brother, upon his marriage with the plaintiff, Elizabeth Pole, settled the lands in question upon her for her jointure. The defendant was privy to the treaty of the marriage, and engrossed the jointure deed, and concealed the entail. Leonard Pole being dead, without issue, and having devised the land to the plaintiff Raw, the defendant, having the deed of entail in his custody, made by his grandfather, brought his ejectment and recovered. The plaintiffs brought their bill for relief, and the defendant, by answer, confessed he was privy to the marriage treaty, and engrossed the plaintiff Elizabeth's jointure deed, and that he had then the deed of entail in his hands; but did not mention his title, nor discover the ancient deed of entail, because he apprehended his brother would dock the entail." The court gave the plaintiff Elizabeth

relief, and as to her enjoined the ejectment, but refused relief to the plaintiff Raw, because he was a mere volunteer. This case must be regarded as a strong one. It does not appear that the defendant procured, or had any agency in bringing about, the marriage between his brother and the plaintiff Elizabeth. He was only privy to it; that is, knew of it and assisted in preparing the jointure deed. His title was a remote one, depending upon the death of his brother without issue, and without having barred the estate tail; and he concealed the deed of entail, not with a view to defraud his brother's wife, but to prevent his docking the entail.

But notwithstanding all these circumstances the court thought that a high moral principle of honesty and fair dealing required it to interpose for the purpose of preventing the defendant from taking advantage of the probable effect of his silence. On the section next succeeding to that which we have already cited, Mr. Justice Story says that "in order, however, to justify the application of this cogent moral principle, it is indispensable that the party so standing by and concealing his rights should be fully apprised of them, and should by his conduct, or gross negligence, encourage or influence the purchaser; for if he is wholly ignorant of his rights, or the purchaser knows them, or if his acts, or silence, or negligence, do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part." Under these exceptions to the general rule, the case of *Tilghman v. West*, 8 Ired. Eq. 183, was decided in favor of the defendant; but it is too obvious to require comment that they do not apply to the present case. The defendant knew his rights and intentionally concealed them, and the plaintiff was no doubt influenced thereby to make the purchase. The plaintiff is therefore clearly entitled to the aid of this court in making his title good. But in order to have it, he must pay to the defendant the twenty-five dollars which he paid to Joshua Ballance, with interest. He may have a decree that upon doing this the defendant shall surrender to him the possession of the land in dispute, and execute a deed for all the right, title, and interest therein which he acquired by his purchase from Joshua Ballance.

Decree accordingly.

OWNER OF LAND IS ESTOPPED FROM SETTING UP TITLE AGAINST INNOCENT PURCHASER, where he stands by and sees another sell it without making known his claim: *Godefroy v. Caldwell*, 53 Am. Dec. 300, and prior cases in

this series in note thereto 302; *Danley v. Rector*, 52 Id. 242; *Titus v. Morse*, 63 Id. 665, and note 670.

THE PRINCIPAL CASE IS CITED AND APPROVED as to the principles of law therein enunciated in *Holt v. Bason's Adm'r*, 72 N. C. 311; and *Sherrill v. Sherrill*, 73 Id. 13; *Hull v. Carter*, 86 Id. 520.

PATTON v. THOMPSON.

[2 JONES'S EQUITY, 411.]

GUARDIAN OF IDIOT OR LUNATIC CANNOT EXCEED ANNUAL INCOME OF HIS WARD'S ESTATE, in expenditures for and on account of his ward, without the permission of the court.

CAUSE in equity from Alamance county. The facts sufficiently appear from the opinion.

Winston, sen., for the plaintiff.

Graham, for the defendant.

By Court, PEARSON, J. There is a general view of this case which disposes of it without the necessity of entering into the many details presented by the exceptions. The guardian of an idiot, or lunatic, cannot sell his land without an order of the court. It follows that he cannot, without the permission of the court, exceed the annual income of the estate in expenditures for and on account of his ward; because, if he can do so, he has it in his power, by exceeding the income year after year, to produce an accumulation of arrears in his favor, so as, in a few years, to make it necessary to sell the land. This is a principle of common law, which is assumed and acted upon as fully in the statutory provisions concerning idiots and lunatics as in those concerning infants: Rev. Code, tit. Idiots and Lunatics; and it is sanctioned and carried very far in its application in the *Matter of Latham*, 4 Ired. Eq. 231, where the court say: "All the lunatic's estate has been converted into money, and only nine hundred and forty-two dollars is now within the reach of this court. We think that this fund must be retained by the committee, not to pay his balance on the debts of any of the creditors, but for the purpose of maintaining the lunatic and his wife and infant children. That the court must reserve a sufficient maintenance for the lunatic before making an order for the payment of debts, or allowing to the committee sums already applied by him to that purpose, is clear, from the nature of the jurisdiction in lunacy as well as from the decisions. In *Ex parte Hastings*, 14 Ves. 182, Lord Eldon said he could not pay

a lunatic's debts and leave him destitute, but must reserve a sufficient maintenance for him; and *Tally v. Tally*, 2 Dev. & B. Eq. 385 [34 Am. Dec. 207], that is cited with approbation by this court."

When a guardian finds that the income of the ward's estate is not sufficient for his maintenance, it is his duty to submit the whole matter to the consideration of the court, and to act under its directions; if he proceeds otherwise, he acts upon his own responsibility.

We do not refer to an accidental expenditure, made necessary by an emergency—sickness, for instance—when the excess of expenditure in one year may be compensated for by drawing upon the income of the next year or two: See *Downey v. Bullock*, 7 Ired. Eq. 102. But we refer to a regular outlay exceeding the annual income year after year, so as gradually to run up a balance against the ward, which, if allowed, will force a sale of his estate. Such conduct is a breach of duty; it is not that "prudent management" stipulated for in his bond; and if carried out, will result in leaving the ward destitute. Our case affords an apt illustration. In 1846 the defendant was appointed guardian of the lunatic; the expenditures exceed the income year after year; and by the master's report there is due to the guardian a balance of four hundred and thirty-five dollars and sixty-three cents in March, 1856. The land of the lunatic, which is his whole estate, allowing for the appreciation of the value of land in that neighborhood, is not worth more than seven hundred dollars; so that if this balance claimed by the guardian is allowed, by his "prudent management" the ward will be stripped of everything he owns, and will be left destitute. The question therefore is this, Shall we refuse to allow the balance claimed by the guardian? or shall we allow it and turn the ward over to the county as a pauper? There is no principle and no authority for allowing the claim.

Upon looking into the testimony, we are satisfied that by prudent management the property of the ward could not have been made to yield an annual income more than enough to provide for him a proper maintenance and cover the outlay and expenditures of the defendant for and on his account; we therefore allow the claims of the guardian to an amount equal to what has been, or ought to have been, received by him as the income of the estate. The result will be to balance the account, and leave nothing due on either side.

Decree accordingly.

GUARDIAN CAN EXPEND NO MORE THAN INCOME OF WARD'S ESTATE for his maintenance and education without the sanction of the court: *Villard v. Robert*, 49 Am. Dec. 654, and lengthy note 657, directly in point; *Davis v. Harkness*, 41 Id. 184, and note 189, collecting prior cases; *Barnes v. Ward*, 57 Id. 590; *Phillips v. Davis*, 62 Id. 472. The principal case is cited to the point mentioned above in *Johnston v. Coleman*, 3 Jones Eq. 293; but it is there said that in cases of physical necessity, as of minors not entitled to maintenance as paupers, and who could not be maintained from the profits of their property, courts will reimburse the guardian out of their estates. The principal case is again cited and distinguished in *Rogers v. Holt*, Phill. Eq. 111, that while the main case was a bill to impeach for fraud a sale under a former decree, no objection was raised either by plea, demurrer, or otherwise in the second suit, and the doctrine of the principal case is indorsed and approved in *Froneberger v. Lewis*, 79 N. C. 430; *Bruner v. Threadgill*, 68 Id. 367; *Dawkins v. Patterson*, 87 Id. 387.

BRINSON v. THOMAS.

[2 JONES'S EQUITY, 414.]

SURETIES ON DEPUTY SHERIFF'S BOND OF INDEMNITY ARE LIABLE BY SUBROGATION TO SURETIES ON SHERIFF'S OFFICIAL BOND, when the sheriff's sureties have been compelled to pay money collected by the deputy sheriff, but not paid over to his principal.

CAUSE in equity from Craven county. The opinion states the case.

Green, for the plaintiffs.

Bryan, for the defendants.

By Court, NASH, C. J. Francis J. Prentiss was duly elected sheriff of the county of Craven, and executed his official bond, with the plaintiffs as his sureties. Prentiss appointed the defendant Thomas as his deputy, and took from him a bond, with the other defendants as his sureties, for the due discharge of his duties. Among the covenants is the following: "So that the said Francis J. Prentiss shall not, by any act or omission of the said Francis D. Thomas, become liable, or subject, to any damage, loss, or cost." Claims were put into the hands of the deputy, Thomas, by one Lovick, to a considerable amount, which were collected by him, and appropriated to his own use. The plaintiffs are the sureties of the sheriff, Prentiss, upon his official bond, and having been compelled to pay to Lovick the amount received by Thomas, this bill is brought by them to subject Thomas and his sureties to the repayment of the money so by them paid. The sheriff, Prentiss, is insolvent

On the part of the defendants it is objected that the plaintiffs

cannot subject them on their bond, because there is no privity between the plaintiffs and defendants. The deputy sheriff is an officer, strictly speaking, unknown to the law. His acts, as such, are the acts of the sheriff, and in the name of the latter he executes and returns all process. The bond he gives, therefore, is not an official bond, but a personal contract between the parties. A sheriff in most of our counties cannot personally perform all his official duties, and for his ease, and for the public convenience, he is allowed to appoint as many deputies as he thinks proper. These deputies are his agents, and all their lawful acts are his acts, and all their misfeasances are his misfeasances. The bonds which they give the sheriff are for his protection. Persons who are injured by his malversation in office, either in not executing process or in appropriating to his own use moneys which come into his hands by virtue of his appointment, can have no redress upon his bond, either against him or his sureties. The deputy's bond to the sheriff is not cumulative. The claim of the plaintiffs, in this case, rests upon a different principle; the right in equity of a surety who pays a debt his principal was bound to pay to be substituted to his rights. He is also entitled in equity to the benefit of such collateral securities as his principal has taken to secure himself.

In this case, the plaintiffs were co-sureties on the sheriff's bond, and though there is no privity between them and the defendants, on the deputy's bond, yet they stand so far in that relation to them that in a court of equity the doctrine of substitution or subrogation will be applied. And as between those standing strictly in the relation of co-sureties the doctrine of equality is fully settled: *Adams' Eq.* 269, 271. And the ground of relief does not stand upon the notion of mutual contract, expressed or implied, between them; but it arises from principles of equity independently of contract: 1 *Story's Eq. Jur.*, sec. 472. The duty of exoneration extends to all persons who are within the scope of the equitable obligation: *Id.*, sec. 493, 5. The equity of the plaintiffs does not depend upon any contract between them and the defendants, but upon the equity existing between them and the sheriff, *Prentiss*, which consists, not only in compelling relief from him, but the right to be subrogated to his place, and to his collateral securities. By the bond of the defendant Thomas, the latter bound himself to indemnify the sheriff, not only against any damage, loss, or cost arising from any act or omission of his, the defendant Thomas; but further, that he should not become liable or subject to any

loss, damage, or cost accruing from any loss or omission. Now, there can be no doubt that upon the failure of the defendant Thomas to pay to Lovick the money collected for him, a right of action, under the covenant recited, accrued to the sheriff; it was an "omission" on the part of Thomas, which amounted to a breach of his bond, because he, the sheriff, became liable to pay the amount to Lovick, and subject to a suit on his official bond. The plaintiffs who have paid the debt due to Lovick, as the sureties of the sheriff, have a right to be subrogated in this court to his rights against the defendants, and to a decree for all the moneys paid by them to Lovick as sureties of the sheriff, deducting all just credits to which Thomas may be entitled against the sheriff.

It is objected by the defendants that persons are made plaintiffs who have no interest in the controversy. All the sureties on the sheriff's bond are complainants; whereas the claim of Lovick was paid by Hiram Brinson and Samuel Mastin; they, therefore, are the parties immediately interested in the claim now brought forward against Thomas. The other plaintiffs are also interested; for, if the debt should not be made out of the defendants, they will be liable for contribution.

The case must be referred to the master, to take an account of the money paid by the plaintiffs Brinson and Mastin to Lovick, as sureties on the official bond of the sheriff; and in taking the account the master will allow the defendants all just credits against the sheriff.

Declare accordingly.

LIABILITY OF SURETIES OF DEPUTY IS CONTINUOUS WITH THAT OF THEIR PRINCIPAL; their undertaking is to make good the official defaults of their principal: *Wallace v. Holly*, 58 Am. Dec. 518; note to *Commonwealth v. Cole*, 46 Id. 510.

THE PRINCIPAL CASE IS CITED in *Blalock v. Peake*, 3 Jones Eq. 325, to the point that the doctrine of substitution applies when the sureties of a sheriff are compelled to pay money through the default of a deputy who has given a bond, with sureties for the faithful discharge of his duties; it is cited in *Towe v. Newbold*, 4 Jones Eq. 215, and *Wilson v. Bank of Lexington*, 72 N. C. 621, that a surety who pays a debt is entitled to an assignment of securities held by a creditor and to substitution.

GRIMSLEY v. HOOKER.

[3 JONES'S EQUITY, 4.]

DEED OF TRUST IS VOID AS AGAINST CREDITORS which allows the debtor to retain possession of goods for more than a year, and such possession is unexplained.

CREDITOR, IN ORDER TO REACH PROPERTY CONVEYED BY FRAUDULENT TRUST DEED, VOID AS TO HIM, must get possession of the property by obtaining judgment and having it seized under execution.

CREDITOR CANNOT REACH PROPERTY CONVEYED BY FRAUDULENT TRUST DEED, void as to him, by taking a deed from the debtor.

CREDITORS CAN HOLD TRUSTEE RESPONSIBLE FOR VALUE OF PROPERTY SOLD, where they have reduced their debts to judgment, but before execution can issue thereon the trustee in a fraudulent deed of trust sells the property upon which the levy would have been made.

CAUSE in equity from Greene county. Tilman H. Dixon, in August, 1853, through forged letters, obtained credit and purchased in New York city four or five thousand dollars' worth of goods from the firms, now plaintiffs and defendants. Upon his return to his place of residence he made a deed in trust to the defendant Hooker of the whole stock purchased. The deed, after reciting the debts contracted by him in his late purchase in New York, recited those which he owned in the neighborhood where he lived. Among the latter was a debt due to Hooker, the trustee, amounting to eight hundred and fifty dollars. The deed further provided that "if the aforesaid debts and every part thereof, together with the lawful interest that may have accrued on the same, shall be fully paid off and satisfied on or before the first day of January, A. D. 1855, then and in that case it shall be lawful, and it shall be the duty of the said Travis E. Hooker, trustee, being thereunto required by three or more of the creditors named in the first class," to advertise and sell the said goods. The deed then classified the debts, including that due Hooker in the first class, while those due the New York firms were placed in the second and third classes. The trust deed was made without the knowledge of the New York merchants, and was never relied upon by the plaintiffs in this case. Hooker's debt of eight hundred and fifty dollars was, with the exception of fifty dollars, entirely feigned. About the twenty-fifth of January, 1854, Hooker took possession of the notes and accounts due to Dixon for goods sold by him; also the remaining stock of goods, which he sold at auction for about one thousand and thirty dollars. Dixon, on the twenty-eighth of January, 1854, executed another deed of trust in favor of certain of the New

York merchants, now plaintiffs, and plaintiff Grimsley, who had a claim of five hundred dollars against Dixon not mentioned in the first trust deed. This latter deed purports to convey the money and effects in the hands of Hooker, also various accounts owing Dixon as payment of the claims of plaintiffs. At the February term, 1854, of the county court of Greene county, plaintiffs obtained judgment for their debts; executions were issued, upon which was a return of *nulla bona*. Plaintiffs' prayer is to set aside the first deed as fraudulent and void; to set up the second; and to hold the trustee to account for the proceeds of the sale of the goods, for the money collected or which might have been collected, and for general relief.

Dortch, for the plaintiffs.

Rodman and Stevenson, for the defendants.

By Court, PEARSON, J. The deed of trust executed by Dixon to Hooker is fraudulent and void as against creditors. To say nothing of the forged letter of recommendation, and the other circumstances which throw suspicion upon the whole transaction, the deed of trust allows the debtor to retain possession of the goods for more than a year, and there is no evidence tending to explain this badge of fraud, or to rebut the presumption that the debtor was allowed to retain possession for his own use, and in the mean time the deed was intended as a cover to protect the property and keep it out of the reach of creditors. Indeed, the insolvency of the debtor, the nature of the goods being ordinary merchandise, readily put out of the way, the feigned debt of eight hundred and fifty dollars to the trustee, and all the circumstances, make out a case of barefaced fraud: *Hardy v. Skinner*, 9 Ired. L. 191; *Hardy v. Simpson*, 13 Id. 132; *Jessup v. Johnston*, 3 Jones L. 335 [*post*, p. 243].

The plaintiffs cannot take the benefit of the deed of trust subsequently executed by Dixon to secure them, without allowing the true debts set out in the deed to Hooker to be first paid; for that deed, although void as to creditors, is good between the parties, and Dixon had nothing at the time he executed the last deed excepting his resulting trust. It is true, the plaintiffs are creditors, and this deed was made to secure them, but under it they derive title from Dixon, and of course get nothing, for he had nothing except the resulting trust. A creditor, in order to reach property which has been conveyed by a fraudulent deed, void as to him, must "take hold" of the property by getting judgment and having it seized under execution. Until that is done, the

debt is merely personal, and gives no lien or title to the property. This is settled by all the cases: See *Green v. Kornegay*, 4 Jones L. 66 [*post*, p. 261], decided at this term. A deed from the debtor will not answer the creditor's purpose. He must reach the property by a title paramount to that of the fraudulent donee.

But the case discloses other facts which give the plaintiffs an equity to hold the defendant Hooker to account for all the property which he took into his possession and sold, and the debts which he collected, or might have collected; and in this view of the case, the fraudulent deed and the debts therein set forth will be put out of the account, and such debts only will be considered as were reduced to judgments, and upon which execution issued. The plaintiffs took judgments and issued executions, which would have been levied on the property so as to give them "a hold on it," but for the fact that Hooker sold all the property, which he was enabled to do by reason of the fraudulent deed, before executions could be issued. This was a wrongful act of Hooker, and a court of equity, acting upon the maxim that no man shall take advantage of his own wrong, will consider the plaintiffs' right to be the same as if they had caused the executions to be levied. To subserve the ends of justice, equity will consider that done which ought to have been done. This is a familiar maxim; and on the same principle, unless the rights of innocent persons be affected, equity will consider that as not done which ought not to have been done. In other words, it will deal with the parties as if the wrongful act had not been done.

There will be a reference for an account.

Decree accordingly.

DEED OF TRUST OF PERSONALTY MADE BY DEBTOR TO SECURE CREDITORS, but which provides for the retention of possession by debtor, whether invalid or valid: See *Somerville v. Horton*, 26 Am. Dec. 242, and note 247; *Clark v. French*, 39 Id. 618, note 623; and see also *Forsyth v. Matthews*, 53 Id. 522.

CREDITOR ATTACKING TRUST DEED ON GROUND OF FRAUD must have reduced his debt to judgment, and must have had execution thereon and return of *nulla bona*: *Meux v. Anthony*, 62 Am. Dec. 274, note 282; *Snodgrass v. Andrews*, 64 Id. 169, note 175; *Williams v. Tipton*, 42 Id. 420, note 421; *Miller v. Miller*, 39 Id. 597, note 599; *Bucl's Ex'rs v. Staley*, 25 Id. 303, and cases collected in note 313; *Green v. Kornegay*, *post*, p. 261; *Peebles v. Pate*, 90 N. C. 353, citing the principal case.

CREDITORS CLAIMING UNDER FRAUDULENT DEED OF TRUST can reach the personal property of the fraudulent donor only by title paramount to the fraudulent donee: *Patts v. Blackwell*, 3 Jones Eq. 454, citing the principal case, which is cited in *Moore v. Rugland*, 74 N. C. 347, to the point that creditors may, as against a fraudulent transfer void as to them, avail themselves of all legal remedies, and in pursuing these remedies, they may, if the property has not been transferred, treat it as the property of their debtor.

FALKNER v. STREATOR.

[3 JONES'S EQUITY, 33.]

EQUITY WILL ENJOIN PLAINTIFF FROM DISMISSING ACTION AT LAW instituted in the name of one for his *cestuis que trust*; but the necessity for injunction does not exist when the right is an equitable one.

EQUITY WILL NOT PREVENT PARTY FROM DISMISSING HIS OWN SUIT, instituted to establish a second equity.

APPEAL in equity from Anson county. At the trial in the court below, counsel for defendant asked that the suit be dismissed at plaintiff's costs, and produced the following power of attorney: "I, Susan Falkner, the plaintiff in the above-stated case, do hereby authorize and direct Thomas S. Ashe and J. R. Hargrave, or either of them, to have the said suit dismissed at my cost, as the amount therein in controversy has been settled June 7, 1856. (Signed) Susan Falkner." Counsel for Joseph W. Falkner opposed this motion, and produced the following power of attorney: "Know all men by these presents, that I, Susan Falkner, have this day authorized, constituted, and appointed Joseph Falkner my true and lawful agent and attorney, in my name, behalf, and stead, to sue for and recover from James T. Streator the following negroes, to wit: Jack, Rachel and child Jane, Lydia, and Lavinia, and to employ counsel, and to do all other acts necessary for the recovery of the said negro slaves in as full and ample a manner as I myself could do were I personally present; and the amount of recovery he is to hold and keep for the use and benefit of A. W. L. Falkner, his ward. And I hereby bind myself, my heirs and executors, to ratify and confirm all the acts and doings of my said attorney. Given under my hand and seal the eighteenth day of January, 1856. (Signed) Susan Falkner. [Seal.]" The court ordered the bill dismissed, being of opinion that the second power of attorney revoked the first. Joseph W. Falkner appealed.

Dargan, for the plaintiff.

No counsel appeared for the defendants.

By Court, PEARSON, J. Where an action at law is instituted in the name of one for the use of another, jurisdiction is frequently exercised in equity to enjoin the plaintiff at law from dismissing the action. This is put upon the ground of necessity, for the right in controversy, being a legal one, can only be established by an action at law; and unless the party entitled to the beneficial interest is allowed to use the name of the party in whom the legal title is vested, the *cestui que use* would be entirely without remedy.

This necessity does not exist where the right in controversy is an equitable one. For if the party entitled to the first equity dismisses a suit in equity brought in his name by the party entitled to the second equity, which can only be worked out through the first equity, or if he refuses to allow his name to be used upon a proper offer to indemnify against the costs, the party entitled to the second equity may file a bill against both plaintiff and defendant in the suit which was dismissed upon a charge of collusion, and in that suit, provided he establishes his own equity, he may establish the equity of the one defendant against the other, out of which his equity grows, and thus obtain complete relief. For instance, in this case a bill may be filed by A. W. L. Falkner against the present plaintiff and defendants, and if the plaintiff in that bill is able to establish an executed trust in his favor, as distinguished from a mere executory voluntary trust, he may then, upon the charge of collusion, set up any equity which the plaintiff in this bill may have against the defendants. So there is, in cases like the present, no necessity for calling upon the court to prevent a party from dismissing his own suit; and no precedent can be found for the exercise of so stringent a jurisdiction. Indeed, the second equity can only be established by an original bill, and cannot be passed upon as is attempted by the present motion. For, as the matter is now before us, we are wholly unable to decide whether A. W. L. Falkner is entitled to an executed trust or to a mere executory voluntary trust, which a court of equity will not enforce. In this proceeding the only evidence before us is the power of attorney, which leaves open the very question upon which the right of A. W. L. Falkner to come into this court depends. There is no error. The order of the court below is affirmed.

Order below affirmed.

DISMISSAL OF ACTION BROUGHT IN NAME OF ONE PERSON FOR BENEFIT OF ANOTHER: See *Cage v. Foster*, 26 Am. Dec. 265.

RIVES v. DUDLEY.

[3 JONES'S EQUITY, 126.]

CORPORATION WHOSE EXISTENCE IS LIMITED TO SIXTY YEARS MAY, WHEN GIVEN SUCH POWER BY ITS CHARTER, ACQUIRE AND CONVEY LAND IN FEE, and an equity of redemption in land so conveyed is subject to sale under execution.

USER OF EASEMENT FOR EIGHT YEARS WILL NOT RAISE PRESUMPTION OF GRANT.

DEDICATION BY OWNER OF PARTICULAR ESTATE WILL NOT BIND THOSE IN REMAINDER OR REVERSION.

OWNER IS ESTOPPED FROM RESUMING PRIVATE RIGHTS OF PROPERTY OVER HIS LAND WHEN BY HIS ACT HE SIGNIFIES HIS INTENTION to appropriate land to the use of the public, and persons in consequence of this act purchase property or build houses with reference to its being used by the public. Such dedication takes effect immediately; but this rule does not apply where there has been no appropriation by the owner to the public use.

DEDICATION TO PUBLIC USE DOES NOT OPERATE AS GRANT, BUT AS ESTOPPEL IN PAIS.

OWNER OF LAND IS ENTITLED TO FIXTURE ERECTED THEREON BY ANOTHER, and a conveyance of the land by the owner conveys the fixture.

AT SALE BY TRUSTEE UNDER TRUST DEED, PURCHASER TAKES ONLY SUCH RIGHT AND INTEREST AS TRUSTEE HAS POWER TO CONVEY, where at the time of the sale the purchaser has notice of a deed conveying a portion of the property purchased.

PARTY IS NOT ENTITLED TO ABATEMENT OF INTEREST ON HIS DEBT SECURED BY TRUST DEED on the ground of a prior tender, if at the time of such tender he required as a concurring stipulation an impossible condition.

CAUSE in equity. By statute of North Carolina, passed in 1831, a corporation was formed and known as the Weldon Toll-bridge Company, and was given power to build a toll-bridge across the Roanoke river at the town of Weldon. The company was empowered by later acts to borrow money, issue bonds and other evidences of debt. Virginia, by statute passed in 1832, created a corporation known as the Portsmouth and Roanoke Railroad Company, whose life should continue for sixty years. North Carolina adopted the Virginia act by statute the same year, and under these acts said company organized. By statute of North Carolina, passed in 1833, the said railroad company was authorized to subscribe to the stock of said bridge company, and to lay their railroad upon said bridge. By statute of North Carolina, passed in 1840 (until which time the two companies used the bridge jointly), the bridge company was empowered to transfer all its rights and property to the railroad company, and to merge the existence of the former in the latter. The terms of the act were complied with, and a transfer made. It was agreed between the companies that the bridge company's debts should be paid by the railroad company. Among these debts was one owing the board of internal improvements of the state of North Carolina, amounting to seven thousand nine hundred and forty-five dollars, with interest. To secure to said board this debt,

the railroad company, by deed of trust dated May 20, 1842, conveyed the whole of said bridge to Edward B. Dudley. Another of the debts of said bridge company was one owing Rochelle & Smith, and amounting to sixteen thousand dollars. For this debt the said railroad company gave its note. This note not being paid at maturity, suit was brought thereon and judgment obtained for the amount of its face and interest. Execution was taken out, and the equity of redemption in that part of the bridge lying in Northampton (one portion being in Northampton and the other in Halifax county) was levied upon and sold to the plaintiff for ten thousand dollars, he having purchased the judgment from Rochelle & Smith. By act of North Carolina of 1848, adopting and combining the previously mentioned acts, the Seaboard and Roanoke Railroad Company was incorporated and organized with authority to construct a railroad from Portsmouth, Virginia, to the Roanoke river in North Carolina. By an act passed in 1846 the debt due the said board was transferred to the public treasury of North Carolina. An act was passed by the legislature of North Carolina in 1850, the effect of which was that the treasurer was "to transfer and surrender to the Seaboard and Roanoke Railroad Company the mortgage held by the state on the Weldon toll-bridge, on condition that the said company execute to the public treasurer, for and in behalf of the state, the bonds of the said company, bearing interest at not less than six per cent." The bonds above mentioned were executed to the treasurer, and he, on January 21, 1851, indorsed and signed the deed of trust above mentioned to said company, and thereby said company, in respect to this debt and deed of trust, succeeded to all of the rights thereto of the said board, and of the state. In 1846 the Portsmouth and Roanoke Railroad Company became extinct. On August 4, 1851, at the request of the Seaboard and Roanoke Railroad Company, Dudley, after making advertisement thereof, sold the before-mentioned bridge at public auction. Plaintiff bought the property thereat for nineteen thousand dollars, but when about to make payment, he insisted on retaining the surplus bid by him over and above the amount secured by the deed of trust. Defendants objected, whereupon he paid the amount of his bid and a deed was executed to him by Dudley. Plaintiff, after he had purchased the equity of redemption, but before the trust deed was conveyed from the aforementioned board to the treasury, applied to the governor, he being *ex officio* president of the said board, and plaintiff offered to pay the amount secured by

the trust deed and made a tender, but demanded that the bridge be conveyed to him. The governor refused. At the trustee's sale before mentioned, when paying the amount of his bid to Dudley, plaintiff gave him notice of the tender, and warned him not to pay interest on the debt from the time of such tender; and plaintiff now prays for an accounting of the fund in the trustee's hands, and that he have a decree for the overplus paid by him, after paying the debt with interest, secured by the deed of trust; and he further prays for general relief. Defendants proved that the bridge, now the property of the Seaboard and Roanoke Railroad Company, is about five hundred and ninety yards in length, and that a large portion of it is built over what is known as Carter's or Burke's island, situated in the Roanoke river. The other facts proved by defendants, as well as the points contended for by them, are stated in the opinion.

Badger, for the plaintiff.

Moore and Barnes, for the defendants.

By Court, PEARSON, J. 1. The plaintiff alleges that by his purchase at the sale, made under execution by the sheriff of Northampton county, in January, 1843, he became entitled to the equity of redemption in all the bridge except that part lying in the county of Halifax, the equity of redemption in which part he admits belongs to the defendants, the Seaboard and Roanoke Railroad Company; and he insists that the excess of the proceeds of the sale made by the defendant Dudley in August, 1851, after deducting the amount secured by the deed of trust, should be divided between the defendants, the Seaboard and Roanoke Railroad Company, and himself, in the proportion of their respective interests in the equity of redemption, that is, in the proportion of the value of the part lying in the county of Halifax to the value of the part lying in the county of Northampton.

The defendants, the Seaboard and Roanoke Railroad Company, oppose this claim by denying that the plaintiff acquired the equity of redemption in that part of the bridge lying in the county of Northampton by his purchase at execution sale; for, as they insist, the Portsmouth and Roanoke company, the maker of the deed of trust to Dudley, owned but a "term of years" in the bridge, and the equity of redemption therein was not liable to execution sale.

We are of opinion that the estate of the Portsmouth and Roanoke company in the bridge was not a "term of years," but a fee-simple, and consequently the equity of redemption was

subject to sale under execution. The company was authorized by its charter to purchase land or have it condemned for the purposes of the road, and there is an express provision that the land so acquired should be held and owned by the company in fee-simple; so that although the existence of the company was limited to sixty years, yet the land acquired by it was owned in fee, and the company could transfer an estate in fee therein.

By the amended charter in 1840, it is provided that "the Weldon toll-bridge shall vest in, and be owned and possessed by, the Portsmouth and Roanoke Railroad Company, in the same manner that all other property, real and personal, which has been acquired by said Portsmouth and Roanoke Railroad Company is owned, held, and possessed."

It follows that the deed to Dudley, having apt words therefor, conveyed an estate in fee-simple, and that the equity of redemption of the company was subject to sale under execution by force of the act of 1812; indeed, the title of the defendants to the equity of redemption to that part of the bridge lying in Halifax was acquired by a sale under an execution issued from the superior court of Warren county; so both parties claim in the same mode; and if the title was not valid, the Portsmouth and Roanoke Railroad Company having lost its corporate existence, there would be no one to call upon the defendant Dudley to account for the excess of the trust fund. As both parties assume that an equity of redemption is divisible, and may be sold in separate parcels, it is unnecessary to express an opinion upon the question; it is alluded to merely to say that we have formed no opinion in regard to it.

2. The defendants, the Seaboard and Roanoke Railroad Company, oppose this claim, by denying that the plaintiff (if by his purchase at execution sale he acquired the equity of redemption in any part of the bridge) acquired it in that part lying in the county of Northampton which is erected over the land from low-water mark at the north side of the river, across the island and Little river to the north butment; for, as they insist, this part of the bridge was not owned by the Portsmouth and Roanoke Railroad Company, and consequently did not pass by the deed to Dudley; and they contend that the plaintiff, if entitled to any part of the excess, is only entitled to such part as is in proportion to the value of that part of the bridge lying over the channel of the main river, compared with the value of the part lying in the county of Halifax (about which there is no

dispute), and also the value of that part lying over the land on the Northampton side from low-water mark to the north abutment; in other words, as the value of the middle section (as it may be termed) is to the value of the rest of the bridge.

In support of this position, it is averred that the land upon which the "north section" of the bridge is erected belonged at the time of its erection to one Martha Carter, the wife of John Carter; that said John died in 1843, and Martha in 1847, leaving as her heirs one Williams, and Martha, the wife of one Bell; that Williams sold to Bell in 1848, and Bell and wife, in 1849, sold to the defendants all the land covered by the bridge, and a slip eighty feet wide, from low-water mark to the north butment, whereby, these defendants insist, the title to this part of the bridge vested in them. It is admitted that the bridge was built on said land by the consent of John Carter; but it is denied that there ever was any judicial condemnation of the land to the use of the company, nor was there ever any conveyance of the same, or any grant of the privilege to erect the bridge, made by Martha Carter to the company, but the bridge was built without her consent, and without any damages paid or secured to her.

To meet this objection, the plaintiff, by an amended bill admitting the facts in reference to the title of the land, and the deed made by Bell and wife to the defendants, the Seaboard and Roanoke Railroad Company, insists, in the first place, that there was a presumed dedication of the land to the bridge company, the bridge having been used by that company and the Portsmouth and Roanoke Railroad Company from 1837 until about 1845, when the company lost its corporate existence, say eight years in all, and two years after the death of John Carter, during which time Martha Carter was not under the disability of coverture; second, that the deed to Bell and wife, if there was no dedication, passed only the land, and did not pass the piers, butment, and superstructure of the bridge; third, that the president and some of the directors of the company were present and bid for the bridge at the sale made by the defendant Dudley, and did not make known in any manner that the company claimed the bridge, or any part thereof; but concealed the fact that any claim was set up other than that which Dudley was about to sell, whereby the plaintiff was induced to bid, and become the purchaser, under the belief that he would acquire title to the whole bridge; and the prayer is, that the defendants, the Seaboard and Roanoke Railroad Company, may be

decreed to release to the plaintiff any title that may have been acquired under the deed of Bell and wife.

As to the question of a dedication: the user of the easement by the bridge company and the Portsmouth and Roanoke Railroad Company, after it succeeded to the rights of the former, was continued but for eight years. This is too short a time to raise a presumption of a grant, or in which to acquire title to an easement by prescription. Twenty years is the shortest period that is allowed to have that effect. This was admitted by the counsel for the plaintiff; but he insisted that the principle of a dedication to the use of the public was altogether different from that of prescription. The former is not based on the idea of presuming a grant; and no particular length of time is necessary to give it effect; it may, under peculiar circumstances, have effect immediately.

The plaintiff cannot sustain himself upon the principle of a dedication to the use of the public. John Carter, at the time the bridge was built, had only a particular estate; the fee was in Martha Carter, his wife. It is settled that a dedication by the owner of a particular estate will not bind those in remainder or reversion, or prevent them from stopping the way dedicated, where the estate comes into possession: *Wood v. Veal*, 5 Barn. & Ald. 454. But we will waive this objection, for the sake of avoiding the point presented by the fact that the bridge was used for two years after Martha Carter was discovered, and put our opinion upon the broad ground that the principle of dedication has no application to the case.

What is the principle? It is this: if the owner does an act whereby he signifies his intention to appropriate land to the use of the public as a highway or street, or square, to be used by the public as a pleasure-ground, or the like, and individuals in consequence of this act purchase property or build houses with reference to its being so used by the public, and become interested to have it so continued, he is precluded from resuming his private rights of property over the land, because it would be fraudulent in him to do so. When individuals have become interested in reference to the use of the land by the public, the dedication takes effect immediately. Without such particular showing, lapse of time, as in cases of prescription, raises a presumption that a resumption of the private right would be injurious to interests acquired on the faith of its continuing to be used by the public, and the resumption would therefore be fraudulent. The dedication to public use does not

operate as a grant, but as an estoppel *in pais*. The doctrine is adopted *ex necessitate*, because there can be no grantee, and regarding it, not as transferring a right, but as operating to preclude the owner from resuming his right of private property, on the ground that it would be fraudulent in him to do so. We are freed from the necessity of inventing an anomalous interest which passes without any legal ceremony and vests without any legal owner: See notes to *Doraston v. Payne*, 2 Smith's Lead. Cas. 90, where the English and American cases are examined with great ability, and the above principle is clearly deduced.

By way of illustration: if the owner of land makes a street opening into ancient streets at both ends, and builds a double row of houses, and sells or rents the houses, this is instantly a street or highway: *Woodyear v. Hadden*, 5 Taunt. 125. So if the owner of a tract of land lays it off into streets and a public square and lots, and sells the lots, this is forthwith a dedication of the streets and square: *City of Cincinnati v. White*, 6 Pet. 431; *New Orleans v. United States*, 10 Id. 662.

In our case, there is not a single element upon which the principle of dedication rests. The land was not appropriated by the owner to the public use. On the contrary, the bridge company entered and appropriated the land to its own purposes. The suggestion that the company intended the bridge to be used by the public as a toll-bridge has no bearing on the question. The same may be said of every railroad. The point is, this property was not to be that of the public, but was to be the private property of the company, to be used by it for gain; and the circumstance that its use would be of public convenience is entirely collateral. So the dedication was not to the public. No individuals had acquired property or interests, in reference to this land, as having been dedicated to the public; and without "that particular showing," as we have seen, the dedication can only be perfected by lapse of time. In the last place, here was a company capable of purchasing and taking by grant; so the necessity, because there could be no grantee, did not call the principle of dedication into operation, or justify any departure from the ordinary modes of acquiring title to land. It was the folly of the company to build the bridge without securing the title to the land, and the interest is so large that we cannot help being astonished at the negligence or ignorance of its agents.

2. If one enters upon the land of another and builds thereon a house, bridge, or other fixture, the owner of the land is enti-

tled to the house, bridge, or fixture. This is familiar learning. Whether the party can, in equity, recover compensation from the owner, who stands by and sees him expend his money, depends on circumstances: *Albea v. Griffin*, 2 Dev. & B. Eq. 9. But this is beside our question. We are of opinion that the deed of Bell and wife did pass to the defendants, the Seaboard and Roanoke Railroad Company, the piers, butment, and superstructure of the bridge, as well as the land on which it was situate.

3. This is a question of fact. The defendants, in their answer to the amended bill, aver that the plaintiff had full notice of the existence of the deed of Bell and wife before he became the purchaser; that the defendant Dudley, at the opening of the bidding, stated in the presence of the plaintiff that he sold only such right and interest as he had a right to sell under the deed of trust to him; and that Bell, at the time, produced, and either read or recited the contents of a copy of the deed which had been executed by himself and wife to the defendants, the Seaboard and Roanoke Railroad Company, in the presence and hearing of the plaintiff. These facts are proved by the witnesses Simmons, Crowder, and Bell, and fully establish that the plaintiff had notice of the claim of the defendants under Bell and wife before he purchased. It is true the purpose avowed by Bell, and his reason for reading a copy of the deed, was to assert his own rights, if he had any; but nevertheless the plaintiff was thereby informed of the fact that the defendants had procured the execution of that deed. Whether the defendants had thereby acquired any rights, and to what extent, was a question which could not then be determined; but notice of the existence of the deed was sufficient to prevent the plaintiff from having the aid of the principle of equity which he invokes for the purpose of being relieved from the effect of that deed. He had notice, and was therefore not deceived, although he may have been mistaken as to the legal effect of the deed. It must be declared to be the opinion of the court that the plaintiff has no title to the "northern section," or that part of the bridge on the north side of the river, from low-water mark to the north butment.

4. Having decided that the plaintiff is not entitled to the north section of the bridge, it follows that the mode of dividing the surplus suggested by him must be rejected. We also reject the mode suggested by the defendants. As the Portsmouth and Roanoke Railroad Company did not own the north section, it

did not pass by the deed of trust to the defendant Dudley, and was not sold by him, and must consequently be put out of the case.

The excess of the fund, after deducting the debt secured by the deed of trust, together with interest, will be divided between the plaintiff and the defendants, in the proportion of the value of the middle section to that of the south section, or part lying in the county of Halifax; for this purpose a commissioner will be appointed to make the valuation and division. The cost will be paid out of the fund. No abatement of interest upon the debt secured by the deed of trust is allowed; because the plaintiff at the time he made the tender required, as a concurring stipulation, that a release of the lien in the whole bridge should be executed to him; whereas the defendants, the Seaboard and Roanoke Railroad Company, had the equity of redemption in the south section.

Decree accordingly. —

GENERAL POWER GIVEN CORPORATION TO ACQUIRE, HOLD, AND CONVEY PROPERTY, is limited to and can only be exercised to effect the purposes for which it was conferred by the government: *State v. Commissioners of Mansfield*, 57 Am. Dec. 409; and note 414; *Lathrop v. Commercial Bank*, 33 Id. 481, note 494; and see as to power of corporations to acquire and convey lands generally: *Reformed P. D. Church v. Mott*, 32 Id. 613; *Despatch Line etc. v. Bellamy Mfg. Co.*, 37 Id. 203; *Susquehanna Bridge & Bank Co. v. General Ins. Co.*, 56 Id. 740, note; *Leggett v. N. J. Mfg. & B. Co.*, 23 Id. 728, and extended note to this subject 740.

EQUITY OF REDEMPTION LIABLE TO LEVY AND SALE UNDER EXECUTION: *Punderson v. Brown*, 2 Am. Dec. 53, note 56.

NO PERIOD SHORT OF TWENTY YEARS IS SUFFICIENT TO RAISE PRESUMPTION OF GRANT OF EASEMENT: *Gayetty v. Bethune*, 7 Am. Dec. 188; *Turnbull v. Rivers*, 15 Id. 622; *Worrall v. Rhodes*, 30 Id. 274, note 278; *Melvin v. Whiting*, 20 Id. 524; *Reimer v. Stuber*, 59 Id. 744, note 746, collecting prior cases.

DEDICATION MUST BE MADE BY OWNER OF TITLE TO LAND: See the well-written and extended note to *State v. Trask*, 27 Am. Dec. 560, where the whole question of dedication to public use is treated of at length and with great learning.

ORIGINAL OWNER IS PRECLUDED FROM REVOKING DEDICATION where property is set apart for the public use and enjoyed as such, and private and individual rights acquired with reference to it, the law considering it in the nature of an estoppel *in pais*: *Sarpy v. Municipality No. 2*, 61 Am. Dec. 221, and cases in note 226; *Abbott v. Mills*, 23 Id. 222; but there must be a clear intention to dedicate: *State v. Trask*, 27 Id. 554, and note 562; *Vick v. Mayor*, 31 Id. 167, note 188; also note to *Godfrey v. City of Alton*, 52 Id. 479; *Warren v. Jacksonville*, 58 Id. 610, and note 616.

DEDICATION INURES AS GRANT: *Brown v. Manning*, 27 Am. Dec. 255.

OWNER OF FREEHOLD ENTITLED TO FIXTURES, WHEN AND WHEN NOT: *Wall v. Hinds*, 64 Am. Dec. 64, and cases in this series collected in notes thereto 75; *Harkness v. Sears*, 62 Id. 742, and case in note 744.

TENDER QUALIFIED BY REQUIRING SOMETHING WHICH THERE IS NO RIGHT TO EXACT IS INEFFECTIVE: *Brooklyn Bank v. De Grauw*, 35 Am. Dec. 569, and prior cases in note 571; *Holton v. Brown*, 46 Id. 148, note 150; and see also *Cary v. Bancroft*, 25 Id. 393.

DEDICATION OF LAND BY OWNER TO USE OF PUBLIC by an immediate act operates as an estoppel *in pais*, and not as a grant: *Askew v. Wynne*, 7 Jones L. 23; and such dedication takes effect *ex necessitate rei*, and the grant needs no grantee to support it: *Kent v. Edmondston*, 4 Id. 531, both citing the principal case.

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CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WINSLOW & CANNON v. STOKES.

[3 JONES'S LAW, 285.]

RECOVERY IN FORMER SUIT IS BAR TO SUBSEQUENT ACTION FOR SAME BREACH OF COVENANT assigned as cause of action in the former suit. IN ACTION FOR BREACH OF COVENANT, WHERE PLAINTIFF IS ENTITLED TO RECOVER DAMAGES, present and prospective, and is restricted therefrom by instructions, this is an error which must be corrected by proper steps in that action, and does not entitle plaintiff to recover in a second suit.

COVENANT, on a writing obligatory, in relation to the management of a saw-mill. Pleas, covenants performed, former suit, and recovery for the same cause of action. At the trial below, it appeared that there had been a former suit involving the instrument in question, and that the same breaches had been assigned as cause of action as in the present case; that plaintiff had recovered damages, and received satisfaction for the same breaches before this suit was brought. The court intimated that this was a full answer to the suit, and the plaintiff then offered to prove that the jury, at the time of the former trial, received instructions from the court to give damages up to the time of trial, and for no longer. The court below, being of opinion that this fact would not alter the case, refused the testimony; plaintiffs excepted. Verdict and judgment for defendant; plaintiffs appeal.

No counsel appeared for the plaintiffs.

Jordan, for the defendant.

By Court, BATTLE, J. The recovery in the former suit upon the same covenant in which the same breaches were assigned was, we think, a bar to the present action, and his honor properly ruled out the testimony which was offered to show that full damages were not then given. The covenant was, in the particulars mentioned, one and indivisible, and upon a breach of it the plaintiffs were entitled to the whole amount of damages, present and prospective, caused by such breach. If the damages were restricted in consequence of instructions from the court, it was an error which the plaintiffs, by taking the proper steps, might have had corrected in that action. Their omission to do so cannot give them the right to harass the defendant with the expense and trouble of another suit. For the distinction between the cases where prospective damages, that is, such as have accrued since the commencement of the suit, may and where they cannot be given, see the case of *Moore v. Love*, 3 Jones L. 215, in which the subject is fully discussed.

Judgment affirmed.

FORMER RECOVERY IN COURT HAVING JURISDICTION CONCLUDES SAME PARTIES and their privies from another trial of the same cause of action or ground of defense: *Gray v. Gillilan*, 60 Am. Dec. 761; *Doty v. Brown*, 53 Id. 350; *Coffin v. Knott*, 52 Id. 537; *Agnew v. McElroy*, 48 Id. 772; *Cutler v. Cox*, 18 Id. 152, and cases collected in notes to these cases.

JESSUP v. JOHNSTON.

[3 JONES'S LAW, 335.]

WHAT CONSTITUTES FRAUD IS QUESTION OF LAW.

CONVEYANCE BY FATHER, OVERWHELMED WITH DEBTS, TO SON, OF NEGROES AND PROPERTY WORTH LARGE SUM, in consideration that son will discharge debts amounting to two thirds of that sum only, raises a presumption of fraud which, if not rebutted, avoids the conveyance as to creditors, and it is the duty of the court to so instruct the jury.

TROVER to recover the value of a slave conveyed by deed from father to son. The substance of the charge of the court, upon which the jury returned a verdict for defendant, is sufficiently stated in the opinion. Defendant had judgment. Plaintiff appealed.

Shepherd and Strange, for the plaintiff.

William McL. McKay, for the defendant.

By Court, PEARSON, J. "What constitutes fraud is a question of law. In some cases the fraud is itself evident when it is the province of the court so to adjudge, and the jury has nothing to do with it. In other cases it depends upon a variety of circumstances arising from the motive and intent. Then it must be left as an open question of fact to the jury, with instructions as to what in law constitutes fraud. And in other cases there is a presumption of fraud which may be rebutted. Then if there is any evidence tending to rebut it, that must be submitted to the jury. But if there is no such evidence, it is the duty of the court so to adjudge, and to act upon the presumption:" *Hardy v. Simpson*, 13 Ired. L. 132.

In our case, the substance of the charge was, that the evidence raised a presumption of fraud; that there was no evidence to rebut the presumption; and it was the duty of the jury to find for the defendant, if they believed the evidence.

The fact that a father finding himself overwhelmed with debts conveys to his son negroes and other property worth six thousand dollars, in consideration that the son will undertake to pay debts amounting to four thousand dollars only, of itself raised a presumption of fraud; for it is neither more nor less than a fraudulent gift by an insolvent father to his son of two thousand dollars, at the expense of his creditors; to say nothing of the other facts, that the son was only twenty one or two years of age; had no property of his own; the debts were reduced to two thousand seven hundred dollars before the name of the son was substituted for that of the father on the notes in bank; and that the negro in controversy, and other property which had been conveyed by the father to the son, was still in hand after the bank debt was discharged. As there was no evidence to rebut this presumption, it was the duty of the judge to instruct the jury that if they believed the evidence, the conveyance was fraudulent and void as against creditors. So in *McCorkle v. Hammond*, 2 Jones L. 444, the fact that a father being about to fail conveyed a stock of goods to a son who was under age, in consideration of his son's notes for a sum which was a fair price for the goods, was held to amount to fraud; the fact that the father had included the son's notes in an assignment which he soon thereafter executed in favor of certain of his creditors, being no evidence to rebut this presumption, inasmuch as the son could not be compelled, either in law or equity, to pay the notes.

These cases all range themselves under the same head, that is, where there is a presumption of fraud and no evidence to re-

but it. *Lee v. Flannagan*, 7 Ired. L. 471; *Young v. Booe*, 11 Id. 347, are instances of another class, where the presumption of fraud is rebutted by evidence explaining the circumstances, and showing that there was no fraud.

The second charge of his honor superseded what he had said in his former charge, by taking higher ground against the defendant; and as we sustain him in that, of course it is not necessary to notice his former charge; and the fact that it was liable to exception as being too vague, and as assuming that the son was under the age of twenty-one, which was contrary to the evidence, can make no sort of difference.

Judgment affirmed.

FRAUD IS QUESTION OF LAW, ESPECIALLY WHEN THERE IS NO DISPUTE ABOUT FACTS: *Sturtevant v. Ballard*, 6 Am. Dec. 281. Fraud is question of law when facts are ascertained: *Pettibone v. Stevens*, 38 Id. 57, and note 61, collecting cases; but see *Dodd v. McCraw*, 46 Id. 301, where it is held that fraud is a mixed question of law and fact to be determined by the jury.

CONVEYANCE BY FATHER ON VERGE OF INSOLVENCY, TO HIS SONS, in consideration of an agreement to pay off certain judgments against him, is fraudulent as to creditors: *Johnston v. Harvy*, 21 Am. Dec. 426, and cases in note 432; to same effect, see *Hanson v. Buckner's Ex'r*, 29 Id. 401, note 407; and a legal presumption arises upon a voluntary conveyance by one at the time indebted that it is in fraud of creditors: *Hutchinson v. Kelly*, 39 Id. 252, and cases in note 263; *Briscoe v. Bronaugh*, 46 Id. 108; and that such conveyance is void: *Whittlesey v. McMahon*, 26 Id. 382, and cases in note 385; a reservation in the conveyance by the debtor of any portion of his property for the benefit of himself or family renders the assignment void as to creditors: *McClurg v. Lecky*, 23 Id. 64, and citations in note 71; *Grover v. Wakeman*, 25 Id. 624; *Goddard v. Hapgood*, 60 Id. 272, note 276.

CONVEYANCES WHICH BEAR SUCH RATIO TO INDEBTEDNESS OF GRANTOR as to tend directly to defeat creditors' claims is fraudulent as to them unless founded upon a sufficient consideration: *Clark v. Depew*, 64 Am. Dec. 717, and note 720.

THE PRINCIPAL CASE IS CITED in *Grimsley v. Hooker*, 3 Jones Eq. 7, S. C., ante, p. 227, to the point that the insolvency of a debtor and his retention for a considerable time of goods conveyed by deed of trust is a badge of fraud which, if unexplained, makes the deed void as to creditors; the main case was cited and its principles indorsed in *Redding v. Allen*, Id. 369; it was again cited to the last section of syllabus, *supra*, in *Winchester v. Reil*, 8 Jones L. 380; and again in *McCauley v. Flinchum*, 89 N. C. 375, to the point that after proper instructions have been given the jury as to what in law constitutes fraud, they may, in such cases as the main case and the one under consideration at that time, be left to determine whether or not a deed is fraudulent as to creditors.

BAILEY v. BRYAN

[3 JONES'S LAW, 357.]

RECORDARI MAY BE USED AS WRIT OF FALSE JUDGMENT.

STATUTE OF NORTH CAROLINA RELATING TO FENCES MUST BE STRICTLY

CONSTRUED, such statute conferring special jurisdiction upon justice of the peace and two freeholders, who are to view the fences of any person against whom complaint is made, and in a proper case estimate damages done to the stock of the party injured; and the judgment of the justice is erroneous when he and the freeholders assess damages for which no complaint is made.

PETITION for a writ of *recordari*, *supersedeas*, and restitution. Petitioner was summoned to appear before a magistrate to answer the defendant upon a warrant that "a certain cattle, the property of the complainant, was unreasonably abused, and greatly injured, and killed one oxen, and that the same was done by the said Annis Bailey and others, or by their connivance and procurement, upon the premises of Annis Bailey; field not inclosed with any sufficient and lawful fence." The same day that the warrant issued the freeholders viewed the property and assessed the damages at fifty-six dollars. They also found that plaintiff "did unreasonably abuse and greatly injure a certain steer, cow, and calf, and killed also a valuable steer, the property," etc. Upon this report judgment was given against the plaintiff in this suit for the amount assessed and costs of suit; thereupon execution issued and was levied upon the personal property of plaintiff, the same sold, and the proceeds applied in satisfaction of the judgment. The petition alleges that at the time of the rendition of the judgment plaintiff applied for an appeal, which was denied by the magistrate, on the ground "that he did not have his forms with him." Upon the return of the writ and record in the court below, the court was of opinion that the judgment of the magistrate was erroneous, and he reversed it and ordered restitution to the plaintiff of the money collected under it. Defendant appealed.

Rodman, for the plaintiff.

J. B. Batchelor, attorney general, for the defendant.

By Court, BATTLE, J. The writ of *recordari* is used here, as it well may be, as a writ of false judgment: *Parker v. Gilreath*, 6 Ired. L. 221; *Kearney v. Jeffreys*, 8 Id. 96.

Among the errors assigned by the plaintiff, there is one so obviously fatal to the judgment given by the justice as to render unnecessary the notice of any other. The act under which

the proceedings were had confers a special jurisdiction upon a justice of the peace and two freeholders, who are to view the fences of the person against whom the complaint is made, and in a proper case to estimate the damage done to the stock of the party injured: See R. S., c. 48, secs. 2, 3; Rev. Code, c. 48, secs. 2, 3. This authority, being under a proceeding so contrary to the proceedings of the common law, must be strictly pursued, and the report of the justice and freeholders must be certified under their hands as the foundation of the judgment to be rendered thereon by the justice. This report ought to embrace only the damages for the particular injury complained of, and the judgment should be for such damages alone.

Here the complaint set forth in the warrant of the justice was for abusing and killing "a certain cattle" and "one oxen," whereupon the justice and freeholders ascertained and reported that the plaintiff had been damaged by the defendant, who "did unreasonably abuse and greatly injure a certain steer, cow, and calf, and killed also a valuable steer," the property of the plaintiff.

The whole amount of the damages is stated to be fifty-six dollars, and the report bears date the nineteenth of November, 1855. Afterwards, on the thirtieth day of the same month, the justice rendered a judgment for that amount, in which no reference is made to the report, but it is expressed to be for that "the defendant did make default, as set forth in the plaintiff's complaint."

It is manifest, in this view of the proceedings, that the justice and freeholders transcended their power in undertaking to assess damages for injuries of which there was no complaint made, and therefore the judgment given by the justice for the amount of such assessment, while it professes to be for "the default as set forth in the plaintiff's complaint," must be erroneous. For this error in the proceedings, without noticing any other, the judgment of the superior court reversing the judgment given by the justice is affirmed.

Judgment affirmed.

RECORDARI FACIAS LOQUELAM.—This ancient writ, now superseded in English practice by the writ of *certiorari*, was in the early history of the law brought into requisition for the purpose of removing the plaint in an action of replevin, or other action of like nature, from the county court into one of the superior courts of common law. The writ issued out of chancery and was directed to the sheriff of the county wherein the cause was pending, commanding him in his full court to cause the plaint to be there recorded, and to have the record before the justices at Westminster on a certain day: Fitz N.

B. 71; Tidd's Pr. 415; Wells on Replevin, sec. 25; Sell. Prac. 160; *Davies v. James*, 1 T. R. 371; *Daygett v. Robins*, 2 Blackf. 415. The writ may be employed by the plaintiff for the purpose of removing the plaint without his showing cause; but if the defendant petition for the writ, he must show cause for the reason that the removal of the plaint is in delay of the plaintiff, therefore the cause of removal ought to appear of record: Tidd's Pr. 415; Morris on Replevin, 59; Gilbert on Replevin, 138. If the writ is sued out by the plaintiff, and on or before the return day thereof the defendant does not appear, "the plaintiff having previously filed the writ and return with the filacer, and should give rule with that officer for the defendant to appear, which expires in four days, and upon his non-appearance within that time sue out a *pone per vadios*, upon which a summons is made out and served upon the defendant, and if he do not appear, the plaintiff on the return of *nihil* should sue out a *distringas*:" Tidd's Pr. 417; and if upon this and the succeeding writs a return of *nulla bona* is had, the plaintiff may sue out a *capias* and proceed to outlawry: Gilbert on Replevin, 106, 107; but if after the issuance of the *recordari* and succeeding writs to compel the appearance of the defendant the plaintiff should file a declaration returnable to a term intermediate to that fixed for the return of the *recordari*, and should also file notice to plead, both the declaration and notice will be set aside for irregularity: *Topping v. Fuge*, 5 Taunt. 771; S. C., 1 Marsh. 341; *Davis v. James*, 1 T. R. 371; and after a time set by rule for the plaintiff to declare, the court will not set this rule aside and compel the plaintiff to declare sooner in actions prosecuted by writ of *recordari*: *Craven v. Vasavour*, 5 Taunt. 35. When the writ is sued out by the defendant, he must file it and the return with the filacer, and then give a rule for the plaintiff to declare; if this is not done, a judgment of *not. pros.* obtained by the defendant will be set aside: *Ward v. Creasey*, 2 Moore, 642; but after obtaining a rule to declare, he may sign judgment of *not. pros.* for want of declaration without demanding it: *James v. Moody*, 1 H. Black. 281; and he is then entitled to costs: *Davies v. James*, 1 T. R. 371; the rule to declare may be served at any time before the rule expires, and the plaintiff must declare within four days after service: *Edwards v. Dunch*, 11 East, 182. With this brief history of the writ and practice connected therewith as administered in England, we come to consider it and the purposes for which it has been used in the United States. An exhaustive search for authorities has failed to disclose that it has been employed in any of the states except North Carolina, where by statute at an early day it was made to answer the purpose of a writ of false judgment, or an appeal to remove proceedings had before justices of the peace to the superior court: Code of N. C., ed. of 1855, p. 74, c. 4, sec. 15. *Recordari* is the foundation of all proceedings in a case of false judgment: *Parker v. Gilreath*, 6 Ired. L. 221; and is the proper remedy to review the act of commissioners in making an improper allotment to an insolvent debtor: *Ballard v. Waller*, 7 Jones L. 84. When the writ is used as a writ of false judgment, it is in the nature of a writ of error, and lies as a matter of right: *Webb v. Durham*, 7 Ired. L. 130; *Leatherwood v. Moody*, 3 Id. 129; *Plummer v. Wheeler*, Busb. L. 472. The plaintiff in the writ must assign his errors, and if not assigned, the writ will be dismissed: *Leatherwood v. Moody*, *supra*; *Suain v. Smith*, 65 N. C. 211; *Collins v. Gilbert*, Id. 135; *Weaver v. Vein Mountain Mining Co.*, 89 Id. 198; *Sossamer v. Hinson*, 72 Id. 578; *Wilcox v. Spethenson*, 71 Id. 409. *Recordari*, in addition to being used as a writ of false judgment, is sometimes used as a substitute for an appeal, in which case the whole matter is tried *de novo* in the higher court: *Salchwell v. Rispass*, 10 Ired. L. 365; *Ledbetter v. Osborne*, 66 N. C. 379; *Cowles*

Adm'r v. Hayes, 67 Id. 123; *Marsh v. Cohen*, 68 Id. 233; *Caldwell v. Beatty*, 69 Id. 365; but the writ must be applied for as speedy as possible, and any delay after the earliest period in the party's power to apply must be accounted for: *Webb v. Durham*, 7 Ired. L. 130; and where a defendant had allowed three terms of court to pass before he made application for the writ, the application was denied and the writ dismissed: *Boing v. Raleigh & Gaston R. R. Co.*, 88 N. C. 62. In *Elliott v. Jordan*, Busb. L. 298, a case where the plaintiff having a claim against the defendant sued out a warrant and placed it in the hands of a constable, with directions to execute it, and have trial thereon, thereby constituting the constable his agent, and after having been notified by the officer of the time set for the trial he failed to attend in consequence of being unwell, and judgment was had against him, of which he was not notified by the officer, it was held that although the constable was guilty of gross negligence in not giving notice of the judgment to his principal in time that an appeal might be taken, still the plaintiff was deprived of his right to the aid of a writ of *recordari*; but in *Critcher v. McCadden*, 64 N. C. 262, where it was proved that the petitioner had a meritorious cause of action, but that judgment was given against him in his absence, and without his knowledge, whereby he lost his right of appeal, it was held that under the circumstances he was entitled to a *recordari*; and again, in *Koonce v. Pelletier*, 82 Id. 236, where it appeared that a defendant was unable to attend the trial, and was not represented thereat, that a judgment was entered against him, and that he lost his right of appeal, the court held that he was entitled to the writ. In this case, the case of *Elliott v. Jordan*, *supra*, is distinguished on the question of agency; and on the ground that a party had lost the right to appeal without any default on his part, and had merits, the writ was granted in *Carmer v. Evers*, 80 Id. 55; and see also *Pugh v. York*, 74 Id. 333. Where a party is deprived of his right of appeal through any fraud or collusion on the part of the justice trying the cause, his remedy is by writ of *recordari*: *Launcester v. Brady*, 4 Jones L. 79; *Critcher v. McCadden*, *supra*; but when the party petitioning for the writ fails to show fraud, accident, surprise, or denial of right by the justice, he is not entitled to the writ: *Satchwell v. Hispeas*, 10 Ired. L. 365; and no appeal lies for a refusal on the part of the justice to dismiss a petition for the writ: *Perry v. Whittaker*, 77 N. C. 102. Before the petitioner is entitled to have the writ issue, he must have paid or tendered to the justice his fees: *Steadman v. Jones*, 65 Id. 388; but their non-payment cannot be urged by a party to the suit as an objection to the docketing of the case upon the return of the writ. This objection can be urged only by the justice: *Carmer v. Evers*, *supra*.

JUDGMENT ENTERED BY JUSTICE OF PEACE BY VIRTUE OF STATUTORY AUTHORITY must show that the requirements of the statute have been complied with, and if it fails in this it is void: *Beach v. Botsford*, 40 Am. Dec. 45, and note 50.

STATE v. HEADRICK.

[3 JONES'S LAW, 375.]

IT IS NOT TRESPASS, AND PARTY CANNOT BE INDICTED FOR REMOVING FENCE, "UNLAWFULLY AND WITHOUT LICENSE," PUT UPON HIS LAND BY ANOTHER, under a statute making it a misdemeanor "if any person shall unlawfully and willfully burn, destroy, pull down, injure, or remove any fence, wall, or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field, or pasture."

INDICTMENT for removing a fence. Defendant was lessee of a field, and built a fence on his own land, near the dividing line between his and the prosecutor's land, which was being cultivated. Said prosecutor unlawfully built a fence upon and joined it to the fence upon the land of defendant. This indictment was brought against defendant for removing that part of the prosecutor's fence which was upon defendant's land. Upon the foregoing facts the court below gave judgment for defendant. The attorney general appealed.

J. B. Batchelor, attorney general, for the state.

No counsel appeared for the defendant.

By Court, BATTLE, J. The present indictment is framed upon the one hundred and third section of the thirty-fourth chapter of the revised code, which enacts that "if any person shall unlawfully and willfully burn, destroy, pull down, injure, or remove any fence, wall, or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field, or pasture," he shall be deemed to be guilty of a misdemeanor. The special verdict states that the part of the fence for the taking away of which the defendant was indicted was "unlawfully and without license" put upon his land by the prosecutor. How it would be unlawful for the defendant to remove this obstruction from his own land we are unable to conceive. If the prosecutor sustained any damage, it was in consequence of his own wrongful act, and he cannot make the defendant criminally responsible for it. "To subject a person to the penalties of the act in question, he must be guilty of trespass," of which the defendant in the present case certainly was not: *State v. Williams*, Busb. L. 197. The judgment must be affirmed.

Judgment affirmed.

Whalon v. Blackburn, 14 Wis. 432, is analogous to the principal case, which it cites and indorses *in toto* as to the doctrine therein evolved concerning the removal, by the owner, of a fence unlawfully erected upon his land.

BROCKWAY v. CRAWFORD.

[3 JONES'S LAW, 433.]

OFFICER OR PRIVATE INDIVIDUAL MAY JUSTIFY ARREST, WITHOUT WARRANT, of a person suspected of having committed a felony, for the purpose of bringing him before a committing magistrate, when such arrest is made without malice and upon probable cause.

TRESPASS *vi et armis*, for false imprisonment. Verdict for plaintiff. Defendant appealed. The opinion states the facts.

Boydén, for the plaintiff.

Wilson, for the defendant.

By Court, PEARSON, J. It concerns the public that all who commit felonies should be punished; hence compounding a felony is a misdemeanor, and the law encourages every one, as well private citizens as officers, to keep a sharp lookout for the apprehension of felons, by holding them exempt from responsibility for an arrest or prosecution, although the party charged turns out not to be guilty, unless the arrest is made or the prosecution is instituted without probable cause and from malice. In our case, actual malice was not alleged, and the main question was the existence of probable cause.

Had a seal been affixed to the warrant of the justice of the peace, so as to compel the plaintiff to sue in case for a malicious prosecution, from the evidence it is clear there could have been no question that the plaintiff had probable cause; so the amount of the case is, that by the accidental omission, on the part of the magistrate, to affix a seal after signing his name, the defendant must not only pay the cost, but is mulcted in damages to the amount of two hundred dollars, without reference to the question of malice or probable cause. This result cannot be right.

Admit that the want of a seal put the warrant out of the way, and enabled the plaintiff to sue in trespass for the false imprisonment, so as to be entitled, without more showing, to nominal damages, yet surely he could only entitle himself to actual damages, on the ground that the defendant had acted maliciously and without probable cause; so the want of a seal ought only to have affected the form of action whereby to subject the defendant to nominal damages and costs, leaving the merits of the case to turn on the question of probable cause.

In regard to this we take a different view from that entertained by his honor; we think there was some evidence tending to show probable cause. On the twenty-second of February, 1855, a horse, the property of one McLeod, is stolen in the town of Charlotte; thus we have a felony committed; suspicion rests upon a man named Clary, who is seen and heard of no more. A brother of McLeod goes to the Huie mine, eighteen miles from Charlotte, in search of Clary, and is there informed that a man calling himself Brockway had been at the mine about the

time the horse was stolen; "the description of the clothes and the personal appearance resembled Clary very closely." Mr. McLeod was so well satisfied that he was the same man that he pursues on to Salisbury. A reward of one hundred dollars is in the mean time offered for the apprehension of the felon. In Salisbury McLeod meets with the defendant; gives him a full account of the felony; of Clary's being suspected, and having absconded; of the advertisement; of the fact that a man calling himself Brockway (who in dress and personal appearance closely resembled the man Clary) had been at the Huie mine about the time the horse was stolen, and was then, as he learned, at the Rymer mine, about six miles from Salisbury, and asks the defendant to go that night with him and have the said Brockway arrested and brought before a justice of the peace for examination. The defendant hesitates; but Calvin S. Brown arrives from Charlotte; he had procured a description of Clary, and confidently expresses the belief that the plaintiff is the man. Esquire D. A. Davis and Esquire John I. Shaver, upon these pregnant proofs, as they were supposed to be, on all hands, expressed their opinion that Brockway was the man Clary, passing under an *alias*; whereupon he is arrested that night; but without any kind of oppression or delay he is forthwith brought before a magistrate, and there being no proof that he is the man, is accordingly discharged.

What has the plaintiff (if he be a good citizen) to complain of? A felony is committed, and the felon escapes; he is advertised, and a reward of one hundred dollars is offered for his apprehension. The plaintiff bears a close resemblance both in dress and personal appearance to the suspected person; his associations and fixedness in his position as a member of the community do not place him above the marks of honest suspicion which attach to him because of the close resemblance to the man who figures under the reward of one hundred dollars as a fugitive from justice. Has he cause to complain? Ought he not rather to congratulate himself that he lives in a land where justice is administered with a steady hand? And if occasionally "the wrong passenger is waked up," every good citizen should bear in mind that it was meant for the best, and will work around for the good of the whole.

Samuel v. Paine, 1 Doug. 359; *Beckwith v. Philby*, 6 Barn. & Cress. 635; *Davis v. Russell*, 5 Bing. 354, are cases of the highest authority, showing that, upon proof much short of that offered by the defendant in our case, the courts in England hold

that an officer or a private individual may justify the arrest of a suspected person for the purpose of bringing him before a committing magistrate, provided there be proof that a felony has been committed. Much might be said as to the effect of our bill of rights upon the *ex officio* powers of a sheriff or constable who acts without warrant, and when there is no immediate apprehension that an escape will be attempted before one can be obtained from a justice of the peace. But a discussion of this matter is not now called for.

BATTLE, J., delivered a dissenting opinion.

Judgment reversed, and a *venire de novo*.

ARREST WITHOUT WARRANT BY OFFICER OR PRIVATE PERSON, upon grounds of probable suspicion that a felony has been committed, and that the person arrested is the felon: *Eanes v. State*, 44 Am. Dec. 289, and extended note 291, on this subject, and also that of arresting the wrong person; *Roberts v. State*, 55 Id. 97, and note embracing both subjects; and see also exhaustive note on arrest to *Hawkins v. Commonwealth*, 61 Id. 151.

THE PRINCIPAL CASE IS CITED to the point in the syllabus, *supra*, in *State v. Shelton*, 79 N. C. 607, and *Neal v. Joyner*, 89 Id. 290.

HARRISS v. WILLIAMS.

[3 JONES'S LAW, 483.]

BUYER MAY RECOVER FOR BREACH OF CONTRACT WITHOUT SHOWING HIS READINESS TO PAY PURCHASE MONEY, where a mutual contract had been made between buyer and seller for the sale and purchase of a horse, but before the execution of the contract the seller disposes of the horse to another party.

ASSUMPSIT to recover the value of a horse. Defendant offered to sell plaintiff a horse for sixty-five dollars. To this plaintiff agreed; but there was a further agreement that defendant should ride the horse home, but not ride him too hard, and should deliver him to plaintiff on the next day, plaintiff to then take the horse at the price above mentioned. On the same day defendant sold the horse to another party, and therefore failed to deliver him as agreed upon; whereupon plaintiff issued his writ, demanded his property, and averred his readiness and ability to comply with his part of the contract. Verdict for plaintiff, with leave to set it aside if the court should be of opinion from the facts that plaintiff ought not to recover. The court was of such opinion, and ordered a nonsuit in favor of defendant, from which judgment plaintiff appealed.

Baxter, for the plaintiff.

N. W. Woodfin, for the defendant.

By Court, BATTLE, J. It is contended by the counsel for the defendant that the alleged contract for the breach of which the suit was brought was never completed; that it was never finally assented to by the parties. In that he is clearly mistaken. The defendant offered to sell his horse for the sum of sixty-five dollars, and the plaintiff agreed to give it. This certainly created an executory contract between them, which neither of them could rightfully dissolve without the consent of the other. The defendant had the right then and there immediately to tender the horse and demand the price; and the plaintiff had the corresponding right to tender the money and demand the horse. But for the defendant's convenience he was permitted by the plaintiff to ride the horse home upon his agreeing to return it the next day, when the plaintiff was to receive it if returned uninjured. This arrangement was not intended by the parties to put an end to the contract, but only to postpone until the next day their mutual rights to enforce it. The defendant then, on the same day, sold the horse to another person at an advanced price, and thereby very clearly committed a breach of his agreement for which the plaintiff could sue him, unless he had omitted something which it was necessary that he should do to entitle him to maintain his action. The counsel for the defendant contends that the plaintiff has failed to show that on the day when the horse was to be delivered he had tendered to the defendant the price, or was ready and able to do so, and that consequently he cannot recover in this suit; and for this position he relies on the case of *Grandy v. McCleese*, 2 Jones L. 142. That case would be in point if the defendant had returned the horse at the time appointed, and the plaintiff had not then tendered the price or been ready and able to do so. But after the defendant had, by selling the horse, put it out of his power to comply with his contract, the plaintiff was discharged from the duty of tendering the money or showing his readiness and ability to do so. This clearly appears from the case of *Grandy v. McCleese*, *supra*, itself, where it is said: "The plaintiff, then, could not sustain his action for a breach of the contract by the defendant without showing that he himself had paid or tendered the price of the corn, or was ready and able to do so, or that the defendant had done something to discharge him from that duty." See also *Abrams v. Suttles*,

Busb. L. 99. The judgment of nonsuit was erroneous and must be reversed, and judgment must be given for the plaintiff.

Judgment reversed.

PARTY TO CONTRACT FOUNDED ON CONCURRENT CONDITIONS seeking to recover for breach thereof must show that he was ready and willing to perform his part of the agreement: *Smith v. Lewis*, 62 Am. Dec. 180; *Sargent v. Adams*, Id. 718; *Hawley v. Mason*, 33 Id. 522; *Shinn v. Roberts*, 43 Id. 636, and citations in notes to these cases giving the different qualifications to the rule above stated.

BROWN v. BEAVER.

[3 JONES'S LAW, 516.]

SCRIPT MAY BE PROVED AS OLOGRAPHIC WILL, though attested by subscribing witnesses.

DEVISAVIT *vel non* to try the validity of a will. The will offered for probate appeared to be attested by a sufficient number of witnesses, but the court, upon inquiry, held one of them to be incompetent. The propounders then offered to prove the will as an olograph. The caveators objected, upon the ground that decedent had intended to attest his will by subscribing witnesses, and that it could not be proved by any other testimony. The court admitted the evidence; the caveators excepted. The will was then proved by other witnesses to be all in the handwriting of deceased, and that it had been deposited with a neighbor for safe-keeping. After being instructed by the court, the jury returned a verdict for the propounders; judgment accordingly. The caveators appealed.

Baxter, for the propounders.

J. W. Woodfin, for the caveators.

By COURT, BATTLE, J. In the case of *Harrison v. Burgess*, 1 Hawks, 384, a script was offered for probate as the olograph will of one Irvine. The caveators objected, because it was attested by one subscribing witness. The court overruled the objection, with this short and emphatic remark: "The will is certainly not worse by having one subscribing witness; it will certainly answer the purpose of more certainly showing that this is the paper which she (the witness) saw deposited in the bureau. Going beyond the requisition in respect of proofs certainly cannot annul that which comes up to them." This reason is certainly decisive of the present case, and shows that

his honor was right in admitting proof of the script as an olograph will. This renders the question as to the competency of one of the subscribing witnesses unnecessary, and makes it improper for us to express an opinion upon it.

Judgment affirmed.

LAW DOES NOT PRESCRIBE MODE OF PROOF OF WILL, nor require it to be proved as well as attested by a specified number of witnesses: *Jesse v. Parker's Adm'rs*, 52 Am. Dec. 102, and note 105; and as to the necessity of proof of will by subscribing witnesses, see *Chaffee v. Baptist Missionary Convention etc.*, 40 Id. 225; *Nelson v. McGiffert*, 49 Id. 170; *Greenough v. Greenough*, 51 Id. 567, and notes to these cases collecting prior cases.

THE PRINCIPAL CASE IS CITED AND APPROVED in *Hill v. Bell*, Phill. L. 125, to the point contained in the syllabus, *supra*.

SCOTT v. BROWN.

[3 JONES'S LAW, §41.]

NON-JOINDER OF NECESSARY PARTIES PLAINTIFF IN ACTION ON CONTRACT may be taken advantage of by defendant, under the general issue, by motion in arrest of judgment, or by writ of error, when the defect appears upon the record.

NON-JOINDER OF NECESSARY PARTIES PLAINTIFF IN ACTION OF TORT must be taken advantage of by defendant by plea in abatement, and not by way of nonsuit on the trial.

NON-JOINDER OF NECESSARY PARTIES PLAINTIFF IN ACTION OF TORT ARISING EX CONTRACTU may be taken advantage of by defendant by plea in abatement or under the general issue on the trial.

RELEASE EXECUTED AT TRIAL OF ONE OF NECESSARY PARTIES PLAINTIFF does not make him a competent witness for his co-plaintiff.

ACTION of deceit in the sale of an ass. Verdict and judgment for plaintiff. Defendant appealed. The opinion states the facts.

The plaintiff was not represented by counsel.

Boyd, for the defendant.

By Court, NASH, C. J. The action is in tort for a deceit in the sale of a jack. The plaintiff and his brother, Cyrus Scott, were the joint purchasers of the jack. The action is brought by G. W. Scott alone. On the trial, the brother Cyrus was offered by him as a witness, and upon objection was set aside by the court. Cyrus then executed a release to the plaintiff of all his interest, and the court held he was then a competent witness. In this there is error.

In all actions on contracts, all in whom the legal interest vests should, in general, be made parties plaintiff; and if any be omitted whom the law requires to be joined, the defendant may take advantage of the omission on the trial, under the general issue, as the contract proved will not be the same declared on; or he may move in arrest of judgment, or proceed by writ of error, if the defect appear on the record. In an action simply of tort, as in trespass to property, real or personal, the defendant must plead in abatement the non-joinder of a part owner, and cannot take advantage of the defect by way of nonsuit on the trial; because one joint owner may recover his aliquot portion of the damages sustained if no notice by plea is given him that the defendant intends to rely upon the defect. There is yet a third class of cases under which this arranges itself, namely, actions of tort arising *ex contractu*. There the defendant may plead in abatement or take advantage on the trial as in an action purely of contract: *Scott v. Godwin*, 1 Bos. & Pul. 71; and *Powell v. Layton*, 2 Bos. & Pul., N. R., 965, which is the third volume of Bos. & Pul.; Story's Eq. Pl. 20, 87.

This is an action *quasi ex contractu*, in which the defendant may take advantage of the non-joinder, under the general issue, on the trial. It was necessary for the plaintiff to prove his contract in order to sustain his action; for if there were no sale, there could be no fraud: See *Gwyn v. Setzer*, 3 Jones L. 382. In doing that, he necessarily showed that Cyrus, his brother, was a joint purchaser with him, and his honor ought to have ordered a nonsuit; and if the plaintiff objected, he ought to have directed the jury that the plaintiff could not maintain his action. It must have been upon the ground that the witness was a necessary party plaintiff, that he was regarded incompetent in the first place; for his release to the plaintiff could not confer upon him any interest which he did not at the time possess. The witness's interest in the damages sought to be recovered was a mere chose in action, and not the subject of an assignment at law. Suppose one of two obligees in a bond assign to his co-obligee all his interest in the bond, could the assignment authorize the co-obligee to sue in his own name alone? Surely not. The action would still have been in the name of both, unless one were dead. After the release, then, in this case, the rule of pleading remained still the same. Cyrus was a necessary plaintiff to the action. If it were not so, it would be very easy, where there are two obligees, for one to bring the action and then to introduce as a witness his joint

partner in the contract, upon the latter's executing a release, which would at law have no operation.

That his honor considered the action as resting on the contract is evidenced by his suffering the plaintiff to recover full damages, which would have been error if it had been for a mere tort.

Judgment reversed, and a *venire de novo*.

WANT OF PROPER PLAINTIFFS IN ACTION ON CONTRACT is an exception to the merits, and should be taken advantage of either upon demurrer in bar or on the general issue, but not in abatement: *Baker v. Jewell*, 4 Am. Dec. 162; *Roberts v. McLean*, 42 Id. 529, and note 531; but see, holding contrary doctrine, *Lurton v. Gilliam*, 33 Id. 430; see also further, on non-joinder of parties, and how taken advantage of, *Hoffar v. Dement*, 46 Id. 628; *Campbell v. Wallace*, 37 Id. 219, and notes to these cases collecting all prior cases in this series.

IN ACTIONS EX DELICTO, NON-JOINDER OF PARTY PLAINTIFF may be taken advantage of only by plea in abatement: *Gilbert v. Dickerson*, 22 Am. Dec. 592; *Wheelwright v. Depeyster*, 3 Id. 345; *Simpson v. Seavey*, 22 Id. 228, and note 233; *Johnson v. Richardson*, 63 Id. 369, and note 372.

NON-JOINDER OF CO-DEFENDANT IN ACTION EX CONTRACTU can only be taken advantage of by plea in abatement: *Jones v. Pitcher*, 24 Am. Dec. 716, note 744.

RELEASE OF WITNESS, WHO APPEARS TO BE REAL PARTY PLAINTIFF, of all interest in the suit, which he delivers to the attorney of the plaintiff of record, is a delivery to himself, and consequently unavailing: *Stevenson v. Mulgett*, 34 Am. Dec. 155; and more directly in point, see *Falls v. Carpenter*, 28 Id. 592.

THE PRINCIPAL CASE IS CITED in *Crump v. McKay*, 8 Jones L. 34, as showing the distinction between actions *ex contractu*, *ex delicto*, and tort arising *ex contractu*, where there is non-joinder of parties plaintiff, and how taken advantage of by defendant; and as to the last-mentioned action, the main case is cited in *Ashe v. Gray*, 88 N. C. 191, to the point that in such action defendant may take advantage of the non-joinder of plaintiffs on all or any of the grounds afforded him in actions *ex contractu* for this cause.

FREEMAN v. BRIDGER.

[4 JONES'S LAW, 1.]

TIMBER SOLD TO INFANT TO BE USED IN BUILDING HOUSE IS NOT NECESSARY for which the infant can be bound.

INFANT CANNOT BIND HIMSELF FOR NECESSARIES WHEN LIVING WITH PARENT OR GUARDIAN, unless it is shown that the parent or guardian was unable or unwilling to furnish him with necessities.

ASSUMPSIT, begun by attachment, for timber furnished an infant. Verdict and judgment for plaintiff; defendant appealed. The opinion states the facts.

Winston, jun., for the plaintiff.

The defendant was not represented by counsel.

By Court, PEARSON, J. An infant is presumed not to have sufficient discretion to enable him to transact business and make contracts. So the general rule is, that the contract of an infant is not binding on him. The exception is, that an infant is bound to pay for goods sold and delivered to him, provided they are necessary for his support. This is put on the ground that unless an infant can get credit for "necessaries" "he may starve;" or, as it is expressed in some of the cases, "an infant must live as well as a man; therefore, the law gives a reasonable place to those who furnish him with necessaries *ad victum et vestitum*, i. e., for victuals and clothes." Lord Coke says: "It is agreed by all the books that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries:" Co. Lit. 172 a. "These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling, and nursing (as well as physic) while sick. In regard to the quality of the clothes and the kind of food, etc., a restriction is added that it must appear that the articles were suitable to the infant's degree and estate. This is familiar learning, but in making the application, it is proper to bear in mind the principle upon which the exception is made. His honor was of opinion that a contract for fifty-five dollars' worth of timber, for the purpose of building a house, made by the defendant while an infant living with his mother, fell within the exception, inasmuch as the timber was used for building a house on the infant's land "suitable to his estate and station in society," and "such as are usually occupied by prudent, economical young men just setting out in life with estates like the defendant's;" it also appearing that he had married, and was living in the house with his wife and child at the time of the trial.

We agree that if an infant marries, the principle of the exception extends to his wife and child. They are to be furnished with necessary food and clothing, for there is no more reason why they should "starve" than the infant himself; but in regard to the timber and the necessity for building a house, we differ from his honor.

The plaintiff's counsel was unable to cite any authority, or even a *dictum*, in support of his honor's opinion, and it is manifestly against the reason of the thing. If the infant is bound to pay for the timber, he must pay for the nails, glass, etc., the

wages of the workman; in other words, for the whole house; and if this be so, on the ground that it is necessary for him to have a house to live in, it follows that he must pay for a horse, a wagon, a plow, etc., because such things are necessary to enable him to cultivate his land; then would follow a few cattle and hogs; so the result would be to make the exception broader than the general rule, and take from infants that protection which the law considers they stand in need of by reason of their want of discretion.

There is another fact set forth in the case which makes the decision erroneous, not only in respect to the timber, but in respect to the fourteen dollars' worth of articles admitted to be necessaries, if the defendant's counsel had insisted upon the objection as to them. The defendant, at the time the articles were contracted for, had a guardian.

While an infant lives with a parent he cannot bind himself even for necessaries, unless it be proved that the parent was unable or unwilling to furnish the child with such clothes, etc., as the parent considers necessary, "for no man shall take upon himself to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom:" *Bainbridge v. Pickering*, 2 W. Black. 1325.

"Guardians for infants are presumed to furnish all necessities, and a stranger who furnishes board, or anything else, must, except under peculiar circumstances, take care to contract with the guardian:" *State v. Cook*, 12 Ired. L. 67; *Hussey v. Roundtree*, Bush. L. 110; *Hyman v. Cain*, 3 Jones L. 111; *Richardson v. Strong*, 13 Ired. L. 106 [55 Am. Dec. 430]; *Downey v. Bullock*, 7 Ired. Eq. 102. These cases settle the rule that where there is a guardian the replication "for necessaries" does not avoid the plea of "infancy;" because the fact of there being a guardian, whose duty it is to furnish all necessities for the support of the ward, shows that it was not necessary for the infant to contract. To allow him to do so would defeat the provision which forbids guardians to exceed the income of their wards, and in fact would put the ward beyond the control of his guardian. It is stated in this case that the guardian assumed no control over the defendant. That does not prove that it was not his duty to do so. But if an infant may contract for timber, build houses, and stock his farm with horses, cattle, etc., it is idle to talk about the control of his guardian. The fate of this defendant (for we see from the record that this action was commenced against him

by attachment, as an absconding debtor) proves the wisdom of the law, and the need infants have of its protection.

Venire de novo.

COLLEGE EDUCATION AND HORSE OR HORSES ARE NOT NECESSARIES: *Middlebury College v. Chandler*, 42 Am. Dec. 537, and cases in note 539; *Rainwater v. Durham*, 10 Id. 637.

INFANT UNDER CARE OF PARENT OR GUARDIAN able and willing to furnish him actual necessities can make no binding contract therefor without the parent's or guardian's consent: *Kline v. L'Amoureux*, 22 Am. Dec. 652, and note 654, unless the guardian refuse to supply the ward with necessities, and upon such refusal the ward may purchase them, and bind himself therefor: *Call v. Ward*, 39 Id. 64, note 65.

THE PRINCIPAL CASE IS CITED to the point contained in the first section of syllabus, *supra*, in *Turner v. Gaither*, 83 N. C. 362; *State v. Howard*, 88 Id. 652. It is again cited to the point contained in the last subdivision of syllabus, *supra*, in *Fessenden v. Jones*, 7 Jones L. 15.

GREEN v. KORNEGAY.

[4 JONES'S LAW, 66.]

IT IS SUFFICIENT DELIVERY OF DEED OF TRUST IF DRAUGHTSMAN INFORMS BARGAINEE of its existence, and he consents to act as trustee under it.

DEED OF TRUST NOT INTENDED AS SECURITY FOR MONEY is not void as to creditors and purchasers if not proved and registered within six months from the time of its execution.

SUBSEQUENT PURCHASER OF PERSONAL CHATTEL cannot set aside prior conveyance to another's intestate on the ground of fraud.

CREDITOR CAN TAKE ADVANTAGE OF VOLUNTARY AND FRAUDULENT DEED OF TRUST only by reducing his debt to judgment and seizing the property under execution.

ADMINISTRATORS SUING TO RECOVER PROPERTY OF THEIR INTESTATE MUST BRING ACTION IN HIS NAME, though he was a lunatic at the time that the cause of action accrued.

DETINUE for a slave which plaintiffs claim by virtue of a deed of trust executed by one Roberts to John A. Green, plaintiffs' intestate. The trust expressed in the deed, the consideration of which was one dollar, was for the sole and separate use of the wife of Roberts during her life, and at her death to be conveyed to him. The subscribing witness swore that he drew, at the request of Roberts, the aforesaid deed, and another by which Roberts conveyed a house and lot to a trustee for the benefit of his wife; that the deed for the slave had never been out of his possession except when being registered; and that it had never been in said Green's possession, but that he made

known the transaction to Green some days after its execution, when Green agreed to act as trustee and authorized witness to act in securing the possession of the slave. Witness demanded the slave of defendant, was refused delivery, and thereupon brought this suit. Witness proved that Green, after the execution of the deed, was insane; that he died in an insane asylum; and that before the bringing of this suit he had occasional attacks of insanity. Kornegay offered in evidence a deed from said Roberts of hire of the slave, which deed was registered within a month from its execution. He also proved that he paid in money the full purchase price of the slave. There was evidence tending to prove that the deed from Roberts to Green was voluntary and fraudulent, and it was proved that Green had never seen the deed which Roberts made to him, and that he had said that he would not act as trustee, and that he would not sue for the slave. The defendant contended for the four points in the following opinion, all of which were decided adversely to him. The jury returned a verdict for plaintiff; judgment accordingly. Defendant appealed.

Bryan, for the plaintiffs.

W. A. Wright, for the defendant.

By Court, BATTLE, J. Neither of the objections urged against the right of the plaintiffs to recover the slave in question is of sufficient force to prevent it.

1. The deed was undoubtedly delivered, if not before, as soon as the draughtsman informed the bargainee of it, and he had consented to act under it as trustee for the *feme covert*: *McLean v. Nelson*, 1 Jones L. 396.

2. The second objection has been properly abandoned here. The deed in question was not intended as a security for money, and is not, therefore, one of those deeds in trust which must be proved and registered within six months or be void as to creditors and purchasers.

3. The recent case of *Long v. Wright*, 3 Jones L. 290, shows that the defendant, as the subsequent purchaser of a personal chattel, could not set aside the prior conveyance to the plaintiffs' intestate. The case of *Williford v. Conner*, 1 Dev. L. 379, is equally in point to show that as a creditor the defendant could take advantage of the deed to the intestate being voluntary and fraudulent only by reducing his debt to a judgment and seizing the property under an execution.

4. The action was properly brought in the name of John A.

Green, the plaintiffs' intestate, though he were a lunatic at the time: *Brooks v. Brooks*, 3 Ired. L. 389. We are aware that it is said in *Stock on Non Compos*, 211, that in England the committee of a lunatic's estate "can neither bring nor defend actions or suits on behalf of the *non compos mentis* without previously obtaining the permission of the court to do so." See *Largent v. Berry*, 3 Jones L. 531. How the objection is to be made, or whether it can be made at all, by the other party on the trial, it is unnecessary for us to inquire. Here the plaintiff died, and his administrators are made parties, and they can undoubtedly recover any property to which their intestate was legally entitled, and which is unlawfully detained from them.

There is no error, and the judgment must be affirmed.

Judgment affirmed

DELIVERY OF DEED, WHAT CONSTITUTES.—Actual delivery into hands of grantee not necessary in order to clothe him with the legal title: *Shirley v. Ayres*, 45 Am. Dec. 546; *Lady Superior v. McNamara*, 49 Id. 184. Assent of grantee a sufficient delivery: *Boody v. Davis*, 51 Id. 210; *Hoffman v. Mackall*, 64 Id. 637, and citations in notes to these cases.

SUBSEQUENT PURCHASER WITH NOTICE OF PRIOR CONVEYANCE cannot avoid it, under the statute to prevent frauds and fraudulent conveyances, on the ground that it was intended to defraud creditors: *Fowler v. Stoneum*, 62 Am. Dec. 490, and note 506.

CREDITOR, IN ORDER TO REACH PROPERTY CONVEYED BY FRAUDULENT DEED OF TRUST void as to him, must get possession of the property by obtaining judgment, and having it seized under execution: *Grimsley v. Hooker*, ante, p. 227, citing the principal case; and see also note thereto collecting prior cases. The principal case is cited to this point in *Moore v. Ragland*, 74 N. C. 347; and in *Bynum v. Miller*, 86 Id. 564, it is cited to this and the point immediately preceding it, *supra*.

WHEN ADMINISTRATOR MUST SUE IN HIS OWN NAME: *Sasscer v. Walker's Ex'rs*, 25 Am. Dec. 272, and cases collected in note thereto.

DAVIS v. BURNETT.

[4 JONES'S LAW, 71.]

ACCEPTANCE BY TWO JOINT OWNERS OF PERSONAL PROPERTY OF THEIR SHARE OF PROCEEDS OF SALE is sufficient to constitute third joint owner agent to sell.

AGENT TO SELL PERSONAL PROPERTY HAS POWER TO BIND HIS PRINCIPAL by warranty of soundness.

AGENT IS NOT PERSONALLY LIABLE WHO AT TIME OF MAKING CONTRACT DISCLOSES HIS PRINCIPAL; but where he binds himself, he is answerable, and if made to suffer in damages arising out of the contract, he is entitled to compensation from his principal.

ASSUMPSIT. Judgment for plaintiff. Defendant appealed. The opinion states the facts.

Donnell, for the plaintiff.

Winston, jun., and Rodman, for the defendant.

By Court, **NASH, C. J.** Three questions present themselves in this case: 1. Was the plaintiff the agent of the defendant in selling his portion of the corn? 2. Had he the power to warrant the soundness of the corn, and thereby bind the defendant? 3. Can he maintain the action upon either of the counts in his declaration?

As to the first: the plaintiff and defendant and one Taylor were the joint owners of a parcel of corn lying in bulk in a crib, each owning one third. The plaintiff sold the whole to one Clements at two dollars per barrel, to be delivered on board of a vessel, when called for, in good merchantable order. Clements subsequently informed the defendant that he had purchased the corn at the price stated, but did not inform him of any other terms. The defendant replied, "It is right." Clements subsequently paid the plaintiff his one third of the price of the corn, and the defendant his third. These facts sufficiently show that Davis was the agent of the defendant to do this particular thing—that is, to sell his portion of the corn, unrestricted by any special instructions.

2. An agent to sell personal property has, by law, power to bind his principal by a warranty of soundness: *Brown on Actions*, 174; *Paley on Agency*, 210. The employment gave the power: *Hey-year v. Hawke*, 5 Esp. N. P. Cas. 75; *Hunter v. Jameson*, 6 Ired. L. 252. The contract between plaintiff and Clements was for the corn to be delivered on board of the vessel, when called for, in good merchantable order. This contract was in writing, and signed by the plaintiff alone. When Waldo & Yarrell, who had purchased from Clements his contract, applied for the corn, they refused to receive it, upon the ground that it was not such an article as they had bargained for, not being in good merchantable order, unless the plaintiff would make it merchantable in Norfolk. This he agreed to do. At Norfolk it was shown that the corn was not merchantable, and the plaintiff paid to Waldo & Yarrell the difference between the corn as it was and what it was agreed it should be. Was the defendant bound by the contract he made with the purchaser? The authorities above cited show that he was, to the amount of his interest in the corn. On this point our attention was called to

the cases of *Meadows v. Smith*, 12 Id. 18; *McCall v. Clayton*, Busb. L. 422. Both these cases differ materially from this. In neither of these did the agent have any interest in the subject-matter of the agency. In the first, the contract was made for the building of a flat for Smith, the defendant. In the other, the note or due-bill, the foundation of the action, was signed George Clayton, "agent for Davidson's River Navigation Company." In both these cases the court say that by their respective contracts, the agents were not bound, but that their respective principals were, and that their payments were officious acts, and they could not recover from their respective defendants the money so paid without their request. Can the money paid by the plaintiff be considered officious? The corn sold was the joint property of the plaintiff and of the defendant and Taylor, lying in bulk, undivided; and the plaintiff was the agent of the two latter to sell their shares, and the whole was sold as sound. When it was ascertained that the corn was not merchantable, the purchasers might have refused to receive it, and were induced to do so only on the condition that the plaintiff would guarantee its merchantable quality at Norfolk. This he did. As to his third, he acted for himself; as to the other two thirds, as the agent of the defendant and Taylor. But the contract was one. He could not guarantee his third without guaranteeing the whole, for the corn was undivided. By his contract he bound himself for the whole, and was answerable for the whole. Although the purchasers knew that two thirds of the corn belonged to Burnett and Taylor, they also knew that one third belonged to the plaintiff.

It is in general true, that where an agent, at the time of making a contract, discloses his principal, he is not personally answerable; but where he binds himself, he is answerable; and if made to suffer in damages arising out of the contract, he is entitled to compensation from his principal: *Hunter v. Jameson*, 6 Ired. L. 252.

We are of opinion, for the reasons above stated. that the plaintiff can maintain his action.

Judgment affirmed.

RECEIVING CONSIDERATION, WHEN NOT RATIFICATION OF AGENT'S ACTS: *Pa. etc. Nav. Co. v. Dandridge*, 29 Am. Dec. 543; and ratification of agent's act will have the same effect as an original authority: *Clealand v. Walker*, 46 Id. 238; *Planters' Bank v. Sharp*, 43 Id. 470; *Despatch Line v. Bellamy Mfg. Co.*, 37 Id. 203; *McMahan v. McMahan*, 53 Id. 481, and notes to cases collecting prior citations.

AGENT BINDS HIS PRINCIPAL BY HIS ACTS within the ordinary scope of his authority, unless specifically limited and restricted: *Jeffrey v. Bigelow*, 28 Am. Dec. 476; *McClure v. Richardson*, 33 Id. 105; *Chouteaux v. Leech*, 57 Id. 602, and citations in notes to these cases.

NEAL v. WILCOX.

[4 JONES'S LAW, 146.]

IN ACTION ON CASE ON "CUSTOM OF THE LAND," INNKEEPERS ARE TREATED AS INSURERS, and are liable without proof of negligence for the loss of goods or animals left in their charge by guests.

ACTION ON CASE ON CUSTOM IS RESTRICTED TO GUESTS, AS DISTINGUISHED FROM BOARDERS who sojourn at an inn on special contract.

IN ACTION ON CASE ON CUSTOM, LIABILITY OF INNKEEPERS IS RESTRICTED TO SUCH GOODS OR ANIMALS as the guest has with him for the purposes of the journey.

CASE for the loss of a mule. Plaintiffs were engaged in the business of buying and selling horses and mules, and defendant was the keeper of a tavern. Neal, one of the plaintiffs, was boarding at defendant's tavern. A drove of mules belonging to plaintiffs were put in a field adjoining defendant's stable-lot, but were fed by plaintiffs, assisted by defendant's servants. Neal being temporarily absent, defendant's boy undertook to take the mule in controversy to water, when he broke away from the boy and was lost. It was not shown at the trial that proper diligence had not been used to recover the mule. The court charged the jury that if they believed from the foregoing facts that Wilcox held himself out as an innkeeper, that Neal was his guest, and that the mule at the time was in his keeping, and escaped, Wilcox was liable for the loss; but if they believed that Neal was a boarder, was himself the keeper of the mule, and only had the privilege of Wilcox's lot, then he, Wilcox, was not liable. Verdict for defendant; judgment accordingly. Plaintiffs appealed.

Donnell, for the plaintiff.

No counsel appeared for the defendant.

By Court, PEARSON, J. This is an action on the case, on the "custom of the land," against the defendant as an innkeeper, for the loss of a mule. In this action, on the ground of public policy, common carriers and innkeepers are treated as insurers, and are liable, except "for the acts of God and the enemies of the state," without proof of negligence. In which respect it

differs from an ordinary action on the case against a bailee. In our case, there being no proof of negligence, the plaintiff properly declared "on the custom." If he could have made this proof, it would have been most proper to declare on the special case; for a recovery in that action may be made against an innkeeper who is guilty of negligence, in many instances, where he would not be liable in "case" on the custom; for instance, one takes boarding at an inn on a special contract; his goods are lost, the innkeeper is not liable "on the custom," but is liable in a special action on the case, if negligence be proved. So if one leave a trunk or carriage to be kept by an innkeeper, or if one deliver a flock of sheep, or a drove of mules, or horses, to an innkeeper to be pastured, he is only liable as bailee on proof of negligence.

The ground of public policy on which an action on the case "on the custom" is given against innkeepers is, that persons who are traveling through the country are under a necessity of putting up at inns for entertainment—*transeuntes causa hospitandi* (from which last word they are called "guests"), without knowing anything about the character of the house; for which reason the law gives an assurance of the safety of their property; that is, the goods and animals (*bona et catalla*) which they have with them for the purposes of their journey.

The reason restricts this action to guests as distinguished from boarders, who sojourn at an inn on a special contract: 3 Bac. Abr. 666, tit. Inns. It is sometimes difficult to draw the line between guests and boarders. They frequently run into each other like light and shade. So the line between a common carrier and a bailee to carry is sometimes scarcely perceptible; but the law makes the distinction, and it is the province of the judge to draw the line. A transient customer at an inn, although he be not a traveler or stranger, is considered as a guest; a lodger, who sojourns at an inn, and takes a room for a specified time, and pays for his lodging on a special agreement, as by the month or week, is a boarder: *Bennett v. Mellor*, 5 T. R. 273.

So the reason restricts the action to one who comes for entertainment—*causa hospitandi*. If one peddling merchandise puts up at an inn, and besides his sleeping apartment takes a separate room in which to show and sell articles—clocks and watches, for instance—these articles are not within the protection of the rule: *Burgees v. Clements*, 4 Mau. & Sel. 306. So if one having a drove of horses or hogs to sell puts up at an inn,

and besides entertainment for himself procures from the landlord a lot in which to keep his animals for the purpose of showing and selling them, they are not specially protected; and it makes no difference whether by the agreement the landlord has them fed, or whether the drover buys provender of the landlord or a third person, and feeds them himself; for, as Lord Ellenborough says in the above case, "an innkeeper is not bound by law to find show-rooms for his guests, but only convenient lodging-rooms and lodging." The rule is restricted to such goods and animals as the guest carries with him for the purposes of his journey. "A flock of sheep is not comprehended among the *bona et catalla transeuntis*, which an innkeeper is bound to receive and protect: *Hawley v. Smith*, 25 Wend. 642. If such articles are received, the innkeeper is only liable for neglect as a bailee. The policy fixing this special liability of innkeepers is to encourage traveling and intercourse among the citizens, and does not reach so far as to take in considerations of trade and commerce.

So the reason restricts the action to the things that are in the house and stables, *infra hospitium*, and does not extend to a horse that is put to grass according to an understanding between the innkeeper and the guest: *Calye's Case*, 8 Co. 32. This applies to horses and mules put into a lot by agreement of the parties.

From these principles, it is clear that the plaintiffs have no right to complain of his honor's charge. The defendant had a right to expect him to be more specific in respect to the distinction between a guest and a boarder—what things are within the protection of the rule, and what are left to the liability of an ordinary bailee, and what place is within the inn—*infra hospitium*.

Upon all these points, according to the facts found by the jury, the defendant was entitled to a verdict. Any one of them was sufficient for his purpose. There is no error.

Judgment affirmed.

INNKEEPER, LIKE COMMON CARRIER, IS INSURER OF PROPERTY OF GUEST committed to his care, but this liability extends only to things properly pertaining to the guest in that relation: *Mateer v. Brown*, 62 Am. Dec. 303, and all prior cases relating to liability of innkeepers collected in note thereto 312.

LOSS OF PROPERTY OF GUEST WHILE IN CHARGE OF INNKEEPER is sufficient *prima facie* to charge the latter with negligence: *Hill v. Owen*, 35 Am. Dec. 124; *Kisten v. Hildebrand*, 48 Id. 416; *McDaniels v. Robinson*, 62 Id. 574; *Johnson v. Richardson*, 63 Id. 369, and notes to these cases collecting all prior cases.

NEWLIN v. OSBORNE.

[4 JONES'S LAW, 157.]

DELIVERY OF DEED IS FINAL ACT OF ITS EXECUTION.**DATE OF DEED PROVED TO HAVE BEEN DELIVERED AT SAME TIME IS PRIMA FACIE PROOF THAT IT WAS EXECUTED ON THAT DAY;** but when rebutted, its execution must be referred to the time when it is proved that the grantor parted with the possession for the purpose of giving effect to it.**ACKNOWLEDGMENT OF DEED FOR PURPOSE OF REGISTRATION IS DELIVERY.****DECLARATIONS OF GRANTOR ANTERIOR TO DELIVERY OF DEED ARE EVIDENCE AGAINST HIM** and those claiming under him.

EJECTMENT to try title of the land in controversy, which plaintiff claimed by virtue of judgment, execution sale, and sheriff's deed. The date of the sheriff's deed was March, 1849. Defendant produced two deeds made by Thomas Davis to him, conveying the same land, dated April, 1845, said Davis being the same party from whom plaintiff obtained the land by virtue of judgment, etc. Defendant proved by the subscribing witness to his deeds that they were drawn by him, that they were signed and sealed by Davis, but that he, Davis, took them away with him. It was not proved that they were ever out of the possession of Davis before being probated, but they were certified to have been acknowledged in the county court in February, 1846. Plaintiff contended that these deeds were fraudulent and void as against creditors, and made to avoid payment of just debts; he also offered to prove declarations made by Davis in May, 1845, to the effect that Davis left one county and went into another to avoid being sued for debt. Also other declarations tending to show fraud, and made at the same time. Upon objection, this evidence was ruled out by the court; plaintiff excepted. Verdict for defendant; judgment accordingly. Plaintiff appealed.

Graham, for the plaintiff.

Norwood and Bailey, for the defendant.

By Court, **BATTLE, J.** The delivery of a deed is the final act of its execution. It is that which gives it force and effect, and without which it is a nullity. When a deed is said to be executed, the meaning is, that with all the other requisites it has been delivered by the one party to or for the other. The date of a deed which is proved to have been delivered at the same time is *prima facie* evidence that it was executed on that day: *Lyerly v. Wheeler*, 12 Ired. L. 290. This evidence may be rebutted by proof that it was not delivered on that day, and its execution

must then be referred to the time when the testimony shows that the grantor parted with the possession for the purpose of giving effect to it, and in such a manner as to deprive him of the right to recall it: *Baldwin v. Maulsby*, 5 Ired. L. 505; *Roe v. Lovick*, 8 Ired. Eq. 88; *Kirk v. Turner*, 1 Dev. Eq. 14. In the case before us, the testimony of one of the subscribing witnesses shows clearly that the deed from Davis to the defendant was not delivered to the grantee, or to any person for him, at the time when it was signed, sealed, and attested; and there is no proof that it was ever afterwards out of the possession of Davis until he acknowledged it in the county court for the purpose of having it registered. That act was a delivery: *Snider v. Lackenour*, 2 Ired. Eq. 360 [38 Am. Dec. 685], but it was a delivery making the instrument operative as a deed, as in other cases, from that time only. The testimony of the witness who was called to prove the declarations of Davis as to the purpose for which he left the county of Orange and went into Chatham related to a time anterior to this, and the declarations were therefore competent against him, and those who claimed under him, and it was error in the court to reject them. For this error the judgment must be reversed and a *venire de novo* awarded.

Judgment reversed.

DEED TAKES EFFECT FROM ITS DELIVERY: *McDowell v. Chambers*, 47 Am. Dec. 539, and note 540; *Van Amringe v. Morton*, 34 Id. 517; *Floyd v. Ricks*, 58 Id. 374.

DEED IS PRIMA FACIE PRESUMED TO HAVE BEEN MADE ON DAY OF ITS DATE: *Hall v. Benner*, 21 Am. Dec. 394, and note 404.

RECORDING DEED, WHEN PROOF OF DELIVERY: *Barnes v. Hatch*, 14 Am. Dec. 369; *Lady Superior v. McNamara*, 49 Id. 184; *Boody v. Davis*, 51 Id. 210; *Blight v. Schreck*, Id. 478; *Wellborne v. Weaver*, 63 Id. 235; *Hoffman v. Mackall*, 64 Id. 637, and notes to these cases.

DECLARATION OF FORMER OWNER RESPECTING HIS INTEREST are generally admissible against those claiming under him by title subsequent: *Padgett v. Lawrence*, 40 Am. Dec. 232, and note 240, collecting all prior cases; and see also *Riddle v. Dixon*, 44 Id. 207, and note 210; *Bird v. Smith*, 34 Id. 453, and note 489.

THE PRINCIPAL CASE IS CITED in *Phillips v. Houston*, 5 Jones L. 303, to the point that if the grantor or donor parts with the possession of the deed, and gives it to the grantee or donee, or to any other person for him, the delivery is complete and the title passes, but it is otherwise if the grantor or donor retain any control over the deed. It is again cited in *Ray v. Gardner*, 82 N. C. 147, and in *Spivey v. Jones*, Id. 181, to the point that grantees are estopped from denying title in him from whom they claim; still they may show a better title in themselves or in some other person with whom they can connect themselves. *Levister v. Hilliard*, 4 Jones Eq. 15, was a case where it was proved by an attesting witness that he made and attested the deed, and left

it lying on the table in the presence of the donor and donee; this case distinguishes the main case as being one where, the bargainee not being present, the subscribing witness handed the deed to the bargainor, who carried it away with him.

GARRARD v. DOLLAR

[4 JONES'S LAW, 175.]

JUDGMENT BY DEFAULT PRECLUDES PARTY FROM USING, FOR PURPOSE OF REDUCING DAMAGES, TESTIMONY which would have defeated the action had plea in bar been interposed.

JUDGMENT BY DEFAULT ADMITS TO BE TRUE ALL MATERIAL ALLEGATIONS PROPERLY SET FORTH IN DECLARATION.

MEASURE OF DAMAGES IS CONTRACT PRICE, WITH INTEREST, IN ACTION BY VENDOR AGAINST VENDEE for failure to complete his contract for the purchase of land, the vendor having made and tendered a deed to the vendee.

INQUIRY of damages upon a judgment by default. The plaintiff offered the following writing in evidence: "This certifies that John W. Garrard and William G. Dollar, of the county and state above named, have made the following contract and agreement, to wit: That the said Dollar has purchased of the said Garrard a certain parcel or tract of land known as Peter's Cross-roads, at ten dollars per acre, and the line as follows [here follows the description]. The said Dollar agrees, when the amount of the land is ascertained, to execute to the said Garrard his bonds with approved security, divided into three parts equally, and payable as follows: first bond payable January 1, 1856; second bond payable January 1, 1857; and the third bond payable January 1, 1858; all bearing interest from date. The said Garrard agrees to give said Dollar possession the first day of October next." The foregoing instrument was dated August 31, 1855, and was under the hand and seal of defendant. Plaintiff proved that the land was surveyed and the amount thereof ascertained before the bringing of this suit, also that defendant refused to give his bonds. Defendant offered to prove that on August 31, 1855, one Jones was the owner of the land in question; that before that time Jones had agreed, in writing, to convey it to plaintiff and to give him a deed upon payment of the purchase money. Plaintiff objected to the admission of this testimony, which objection being overruled and the evidence admitted, plaintiff excepted. Defendant proved by Jones that since the alleged breach of contract plaintiff had paid him (Jones) the whole of the purchase price of the land, and that he had

executed a deed in fee for the land to plaintiff. Plaintiff then offered to file an escrow to defendant to be executed upon the payment of the purchase money for the land. The following special verdict was found by the jury: "That the defendant covenanted with the plaintiff to give his bonds for two hundred and eighty-seven and one fourth acres of land, at ten dollars per acre, and they assess his damages at two thousand eight hundred and seventy-two dollars and fifty cents, unless their further finding, to wit, that at the time of the breach of the said covenant the plaintiff had no title to the land, but the same was, and continued, in Mr. Jones until the present term of this court, ought, in law, to be taken in mitigation of damages; and if it ought so to be taken, they assess the plaintiff's damages at sixpence." Judgment for plaintiff for sixpence and costs. Plaintiff appealed.

Norwood, for the plaintiff.

Turner and Miller, for the defendant.

By Court, BATTLE, J. We are clearly of opinion that the judgment by default precluded the defendant from using, for the purpose of reducing the damages, testimony which would have defeated the action had a plea in bar been put in. A default admits all the material averments properly set forth in the declaration, and of course everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible: 2 Sell. Pr. 25; *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 358; *East India Company v. Glover*, 1 Stra. 612; *Foster v. Smith*, 10 Wend. 377. In the case last cited, which was an action of trespass for false imprisonment, the principle upon which the rule is founded is well explained. "The evidence," says Nelson, J., in delivering the opinion of the court, "would have been inadmissible under the general issue in justification, without notice or special plea, were it not for the provisions of the statute for the more easy pleading of public officers, and those acting in aid of them, and the reasons given are to prevent surprise upon the plaintiff on the trial, and to enable him to meet the defendant upon equal terms with respect to the evidence: 1 Ch. Pl. 493. These reasons are equally strong against allowing the evidence without notice, in mitigation of damages; besides the inconsistency of hearing evidence in contradiction of the legal effect of the record, which is not pertinent to any issue presented by it. If this practice

were tolerated, it would enable defendants to have substantially the benefit of a justification in every case in which evidence could be procured to establish it, without notice to the plaintiff of such defense; for if admissible, and the justification should be proved, the least effect that could reasonably be given to it would be to reduce the inquest to nominal damages. This would be the standard of damages in all cases upon such proof." These reasons seem to us to be unanswerable when applied to the action of trespass, and they are not less cogent in their application to the present action of covenant for a breach of a contract under seal. If the testimony which would have defeated the action upon a plea in bar be admitted in mitigation of damages upon the defendant's default, it will give him the great advantage of repudiating his contract upon the payment of nominal damages, for no second action can be brought upon it. But if the defendant had pleaded, and thereby given the plaintiff notice of his ground of defense, the latter might have submitted to a judgment of nonsuit, and afterwards brought another action when he had done what was necessary on his part to enable him to sustain it. On an inquiry of damages, then, upon a default, all the material allegations of the plaintiff's declaration are to be considered as admitted by the defendant to be true, and the only question will be, What is the rule of damages in the particular case? If the damages be in their nature uncertain, as in many of the forms of action they will be, then the amount will have to be ascertained by the proofs which each party may be able to produce. If they are certain, or by computation capable of being reduced to a certainty, then there will be little or no room left for proof. In the case before us, the defendant covenanted to pay a certain price per acre for a tract of land, the number of acres of which was to be ascertained by a survey. It was so ascertained, and the sum agreed on to be paid was thus reduced to a certainty. That sum the plaintiff is entitled to recover as damages, unless it be the rule that a vendor of land, after doing everything he can towards the fulfillment of his part of the contract, can recover from the defaulting purchaser nominal damages only.

This is an important practical question, and upon it the decisions of courts in different countries do not seem to be uniform. In England, it is said that when the vendee refuses to perform the measure of damages is held to be the difference between the price fixed in the contract and the value at the time fixed on for the delivery of the deed; so that if the property

does not fall in value the vender can get nothing but nominal damages. Thus in the case of *Laird v. Pim*, 7 Mee. & W. 484, where an eminent judge, Baron Rolfe (who is now the Lord Chancellor Cranworth), had at the trial restricted the vendor to nominal damages, the court of exchequer, on the argument of a rule to show cause why the damages should not be increased to the amount of the purchase money, said: "The question is, How much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too." There are, indeed, some prior English cases which seem to have held a contrary doctrine: *Goodisson v. Nunn*, 4 T. R. 761; *Glazebrook v. Woodrow*, 8 Id. 366. In Vermont, the rule as laid down by the court of exchequer was recognized: *Sawyers v. McIntire*, 18 Vt. 27. A different rule prevails in Maine: *Alna v. Plummer*, 4 Greenl. 258; and in New York: *Shannon v. Comstock*, 21 Wend. 457 [34 Am. Dec. 262]; *Williams v. Field*, stated shortly in a note to page 192 of Sedgwick on Damages. Mr. Sedgwick says that "the question is evidently not free from perplexity. On the one hand, it is said that the vendor, by making a tender, has performed his contract so far as it lies in his power; that his right is complete to the performance of the contract by the vendee, and that this performance is the payment of the purchase money. But on the other side, it is replied with great force, that the recovery cannot pass the fee in the land; that the legal seisin still remains as at first; that the vendor has not parted with his property; that if the land has not fallen in price he has lost nothing; that the common law gives damages for none but actual loss; and it is insisted that the true measure of damages in such a case is the difference between the stipulated price and the actual value at the time of the breach, or perhaps at the time of the trial:" Sedgwick on Damages, 191, 192. The author, in a note to the page last referred to, expresses his preference for the latter rule, though he admits that it is different with respect to the sale of personal chattels: See Id. 281.

The counsel have not referred us to any case in our court where the rule has been settled. In the absence of an express adjudication, we feel at liberty to adopt the rule that gives to the vendor the contract price, with interest thereon, when he shows he has done all in his power to complete the contract on his part, by making and tendering a deed to the vendee. If a court of law cannot take into consideration the fact that upon

the payment of the purchase money the court of equity will compel the execution of a deed by the vendor, it can enforce its own salutary principles, that no person shall take advantage of his own wrong; and will thus prevent an unscrupulous vendee from mocking his innocent vendor, by refusing to perform his solemn engagement, and submitting to a judgment for a penny damages.

The judgment given in the court below in favor of the plaintiff for sixpence damages is reversed; and judgment will be entered in this court in his favor, upon the special verdict for two thousand eight hundred and seventy-two dollars and fifty cents, and also for costs.

Judgment reversed.

DEFAULT ADMITS CAUSE OF ACTION and material and traversable averments, but not the amount of damages: *Willson v. Willson*, 57 Am. Dec. 320, and prior cases collected in note 330.

IT IS DUTY OF VENDOR TO PREPARE DEED and have it ready for delivery when he demands the payment of the purchase money: *Hardy v. McKesson*, 7 Jones L. 571, citing the principal case; which is again cited in *Parker v. Smith*, 64 N. C. 292, to the point that judgment by default admits plaintiff's claim for damages when the damages are precise, and fixed by agreement of the parties. The main case is again cited in *Lee v. Knapp*, 90 Id. 178, to the point that in an inquiry of damages upon a judgment by default nothing that would have amounted to a plea in bar can be given in evidence to reduce the damages.

MEASURE OF DAMAGES AGAINST VENDEE FOR REFUSING TO PERFORM HIS CONTRACT FOR PURCHASE OF LAND.—1. ENGLISH DOCTRINES.—It has been said in England that actions against the vendee of land by the vendor for refusal to complete his contract stand on exactly the same footing as actions for not accepting goods: *Laird v. Pim*, 7 Mee. & W. 478; *Noble v. Edwards*, L. R. 5 Ch. D. 378. Hence it was held that a railway company, after giving statutory notice of intention to take lands, is responsible for damage sustained by the owner if it fails to take the necessary steps for assessing the compensation: *Morgan v. Metropolitan Railway Co.*, L. R. 3 C. P. 553; S. C., 37 L. J., N. S., C. P. 265. In one case the plaintiff in an action for refusal to complete the purchase of land seems to have recovered the whole purchase money: *Hawkins v. Kemp*, 3 East, 410. In another case there seems to have been an implication in favor of such recovery: *Goodisson v. Nunn*, 4 T. R. 761; and in *Glazebrook v. Woodrow*, 8 Id. 366, it was decided that no action for the purchase money could be brought by the vendor without averring that he had conveyed, or tendered a conveyance. But whatever doubt there may have been in the earlier cases of this kind, it is now decided that though the plaintiff or vendor is in no fault, and has done all his contract required of him, it is not the correct rule to allow him to have the land and its value too. The leading case on this subject is that of *Laird v. Pim*, 7 Mee. & W. 473, in which it was said by Parke, B., that the conveyance and the payment are to be contemporaneous acts. A tender of the conveyance, said he, is not sufficient; it must be executed before payment can be enforced. He illustrated this by showing that if two men agree, one that the other shall have his horse on

payment of ten pounds for him, no action lies for the money until the horse be delivered. He admitted that an action for damages could be sustained for breach of the contract; but denied that the vendor could recover the purchase money until after the execution of the conveyance. In the same case, Parke, B., said: "The measure of damages in an action of this nature is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, How much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too."

It follows, therefore, that if plaintiff is not inconvenienced by the loss of the purchase money, or if the property does not fall in value, the vendor can recover nothing. He cannot contend for the amount of purchase money agreed on, with interest; but only for damages actually sustained by vendee's breach of the contract. In agreements for the purchase of land, a clause is often inserted for a deposit, and a forfeiture of that if the vendee or purchaser does not fully carry out his contract; but while the deposit may be declared forfeited as liquidated damages, the vendor may still go for damages at large, and is not confined to the deposit: *Icey v. Grew*, 6 Nev. & M. 467; *Hinton v. Sparkes*, 3 L. J. C. P. 161; S. C., 37 L. J., N. S., C. P. 81. In the absence of a stipulation to that effect, the deposit would not be forfeited; but where parties contract that the deposit money shall be forfeited if the purchaser fails to carry out his contract, no part of the deposit can be recovered back on the ground that the forfeiture was in the nature of a penalty, and the actual loss to the vendor was less than the amount of the deposit. It seems that the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit, which is in reality not a pledge, but a payment in part of the purchase money. The result is, that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained: See case last cited. This principle is applied in sales by auction, where the usual conditions of sale are that if the vendee fails to complete the purchase the vendor may sell and the vendee shall pay expenses of resale and make good the deficiency of price, if any: *Ex parte Hunter*, 6 Ves. 94. And the same principle will be applied in other cases, even without any express stipulation. Thus, where the purchaser declined to accept land on account of an objection to title, and the vendor sold again for a lower sum, it was held that he was entitled to recover as damages the difference between the price contracted for and that which he ultimately received: *Noble v. Edwardes*, L. R. 5 Ch. D. 378. In *Ockenden v. Henly*, EL. BL. & EL. 493, S. C., 27 L. J., N. S., Q. B. 361, it was held that if a deposit is given on purchasing at auction, and the vendor subsequently resells and brings an action for the deficiency, that deposit is treated as part of the purchase money, and the vendor's recovery is diminished by that amount. This question was again considered in *Essex v. Daniell*, L. R. 10 C. P. 538, where one condition of the auction sale was that if the vendee failed to complete the sale the deposit money should be forfeited and the vendor should be at liberty to resell, the vendee to be liable for any deficiency between the first sale and the subsequent one, and for the expenses of the first sale. In that case there was no resale, and it was distinguished from *Ockenden v. Henly*, *supra*, on the ground that in the latter case there was a resale, and plaintiff claimed for the deficiency.

"Under ordinary circumstances," said the court in *Essex v. Daniell*, *supra*, "where the purchaser fails to complete, without any default on the part of

the vendor, the latter is entitled to recover all the expenses he has incurred in preparing for the sale, and also the loss incurred upon a resale, that is, the difference of price, if any. Here, by the conditions of sale, the deposit is absolutely forfeited upon the purchaser's default, and the vendor is entitled to recover the expenses he has incurred. If he claimed, in addition, the difference between the sum bid at the first sale and that realized on a resale, then the case of *Ockenden v. Henly*, *supra*, would apply." Here, however, as there was no resale, the court held that the vendor was entitled to recover the expenses incurred by him in preparing for the abortive sale, and also to retain the deposit.

As to interest, it has been held that where the vendee in a contract for the purchase of real estate takes possession of the property as owner, without a conveyance and not having paid the purchase money, he is bound to pay interest, as the act of taking possession is an implied agreement to pay it: *Fludyer v. Cocker*, 12 Ves. 25. Where a promissory note is given for the price of land, and the consideration has not entirely failed, although no conveyance has been executed, the vendee must pay his note and resort to his remedy on the agreement, or go into equity for a specific performance: *Moggridge v. Jones*, 3 Camp. 38; S. C., 14 East, 486; *Spiller v. Westlake*, 2 Barn. & Adol. 155, 22 Eng. Com. L. 73. Where the vendee refuses to perform his contract for the sale of land, the seller has two remedies at his command for redress: a legal one, and an equitable one. These are discussed in *Noble v. Edwards*, L. R. 5 Ch. D. 378; *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 376; see *infra*. In conclusion, then, the English rule is this, that the measure of damages is the difference between the price fixed by the contract and the market value at the time of vendee's breach of the agreement; and the same principle is involved and the same rule applied in estimating the damages, whether the action is one for the breach of a parol agreement or one for the breach of a contract under seal: *Marcus v. Smith*, 17 U. C. C. P. 416, reviewing the cases. When the market value is unascertainable, and a serious loss and injury is proved, the court, acting on the principle that no wrong done is to remain without redress, awards substantial damages; but such damages must not be greater in amount than the amount the vendor would have been entitled to under the contract if it had been punctually carried out: *In re Lafitte Claims*, 23 Week. Rep. 379.

2. RULES IN UNITED STATES.—1. *Vendor's Legal and Equitable Remedies*.—Where the vendor has offered to do all that the contract for the sale of land requires of him, and the vendee refuses to perform his contract for the purchase, it is well settled that the vendor may either resort to a suit in equity for specific performance, or bring an action at law for damages. The suit in equity is often troublesome and expensive, and the course at law may often be the shorter and more satisfactory one. The seller may not, however, be content with damages, in which case he may have specific performance and get his purchase money. He has the land which he does not want, and has not the money which he does want, and which by his agreement he ought to get. The inadequacy of the relief given in courts of law would thus be one reason why it is considered necessary to invoke the aid of a court of equity to enforce the specific performance of the contract. If the vendor be driven to his action at law, he retains the land, and can only recover the difference between the stipulated price and the price it would probably fetch if resold, together with incidental expenses and special damage. He is left with the estate on his hands, and will recover damages only according to the views of a jury: *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 360, 376, 377;

Noble v. Edwardes, L. R. 5 Ch. D. 385; *Scudder v. Waddingham*, 7 Mo. App. 26; *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25; S. C., Sedgwick on Damages, 34; *Richards v. Edick*, 17 Barb. 260; *Lewis v. Lee*, 15 Ind. 490; *Porter v. Travis*, 40 Id. 556, reviewing the cases; *Kauffman's Appeal*, 55 Pa. St. 383; *Pennock v. Freeman*, 1 Watts, 401; *Miller v. Collyer*, 36 Barb. 250. And no rule in respect to such contract is better settled than this: "That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done:" *Hansbrough v. Peck*, 5 Wall. 507.

2. *Action, when Maintainable—Tender, when Unnecessary.*—Of course no action can be maintained on the contract unless there has been a breach of some one of its stipulations by defendant or vendee before the suit was instituted; as where payment of the purchase money was to be made in installments, and suit was brought immediately after vendee's repudiation of the contract, but before any payment became due: *Greenway v. Gaither*, Taney's Dec. 227. And when a conveyance of real estate is to be executed upon payment of the purchase money, the acts are so far dependent that the grantor cannot recover in an action for the purchase money without showing a performance on his part by the tender of a deed of conveyance, or an offer to convey upon payment: *Berryhill v. Byington*, 10 Iowa, 223. But if the vendee tell the vendor before the day of performance that he will not perform, no tender is necessary: *Franchot v. Leach*, 5 Cow. 506. So where the vendee has previously declared his inability to perform his contract: *Dixon v. Oliver*, 5 Watts, 509. And where the purchase money is to be paid or secured and the conveyance executed on a particular day, and neither party performs or offers to perform on the day, neither can maintain an action at law upon the contract: *Stevenson v. Maxwell*, 2 N. Y. 408. A subsequent tender of a conveyance will not entitle the vendor to an action for the purchase money: *Feller v. Weybright*, 8 Ohio, 167. But if the terms of the contract show that payment of money is to be made before the deed is to be given, and no money is paid or offered at the time fixed, an action at law can be maintained without first tendering a deed of the land: *Robinson v. Heard*, 15 Me. 296. Where the vendee, by the terms of an auction sale, has an option of taking the estate after it is bid off to him, and in case of refusal of having it sold again on his account, it has been held that no action can be maintained against him for a breach of the contract until a resale shall have ascertained the deficiency in value, if any: *Webster v. Hoban*, 7 Cranch, 399.

3. *Measure of Damages.*—Where the vendor has done all that his contract calls for, it seems now to be well settled by good authority that upon the vendee's refusal to accept the deed tendered him, or to perform his part of the contract, and the purchase money remaining unpaid, the seller is not entitled to recover the whole amount of money agreed to be paid for the land, but only the difference between the contract price and the market value at the time of the breach, if at that time there was any decrease in such value. And where the defendant refuses to receive the deed and pay for the land, it is immaterial whether the plaintiff keeps or sells the land; and if he sells it, he is not bound to obtain defendant's consent to the sale, or to consult him in relation thereto: *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25; S. C., Sedgwick on Damages, 36; *Scudder v. Waddingham*, 7 Mo. App. 26; *Lewis v. Lee*, 15 Ind. 500; *Meason v. Kaine*, 63 Pa. St. 335; *Porter v. Travis*, 40 Ind. 556, reviewing the cases; *Robinson v. Heard*, 15 Me. 296; see *Dayton, W. V. & X.*

T. Co. v. Coy, 13 Ohio St. 91, reviewing the cases; *Griswold v. Sabin*, 51 N. H. 167, reviewing the cases; *Bowser v. Cessna*, 62 Pa. St. 148; *Laraway v. Perkins*, 10 N. Y. 371; *Ellet v. Paxson*, 2 Watts & S. 418; *Wilson v. Holden*, 16 Abb. Pr. 133, where the time is extended to the bringing of the action. In the following cases it was held that actual damages might be recovered: *Boardman v. Keeler*, 21 Vt. 77; *Adams v. McMillan*, 7 Port. 73; *Huber v. Burke*, 11 Serg. & R. 238; *Evrit v. Bancroft*, 22 Ohio St. 172; *Meason v. Kaine*, 67 Pa. St. 126; *Philadelphia W. & B. R. R. Co. v. Howard*, 13 How. 317. In Pennsylvania, where one sold land for five thousand dollars, the vendee agreeing that the seller should have the advance over that sum, with interest and taxes, that he could sell the property for within five years, and on a certain day the seller notified the purchaser to sell the property, it was held that the price which it would have brought on that day in advance of the purchase price was the measure of damages, and not the difference between the highest price at which it could have been sold within the five years and the original consideration: *Means v. Milliken*, 33 Pa. St. 517. In auction sales made by administrators, executors, sheriffs, commissioners, etc., the notion that the vendor can retain the land and recover the purchase money too is repudiated, and the wholesome policy of the general rule is approved. Consequently, in such sales it has been held, where the vendee refuses to consummate his purchase, that the land may be resold, and that the difference between the price at which the land was first bid off and the price for which it sold at a subsequent and second sale, if less than the first bid, affords a good criterion of damages. This rule also includes additional expenses of the second sale: *Adams v. McMillan*, 7 Port. 73; *Miller v. Collyer*, 36 Barb. 250; *Webster v. Hoban*, 7 Cranch, 399; *Bowser v. Cessna*, 62 Pa. St. 148; *Hutton v. Williams*, 35 Ala. 503. But it is necessary that the second sale, as well as the first, should be conducted with fairness, and no means be resorted to which would impair the value of the land in the estimation of the public: *Adams v. McMillan*, 7 Port. 88; *Bowser v. Cessna*, 62 Pa. St. 148. Where part payment has been made by the vendee, the measure of damages seems to be the whole unpaid balance of the purchase money with interest: *Sanborn v. Chamberlin*, 101 Mass. 409. But after purchaser's breach of contract, if the land be sold under a foreclosure against the vendor, and there be a deficiency upon the sale with which the purchaser be personally charged, it is error to award to the vendor, as his damages, the difference between the contract price and the price of such forced sale, together with the amount charged upon him for the deficiency: *Wilson v. Holden*, 16 Abb. Pr. 133. The measure of damages should not be estimated from any profit made upon a subsequent sale of the land: *Pennock v. Freeman*, 1 Watts, 401; but the vendor ought to recover compensation for all the loss he has sustained by reason of defendant's refusal to perform the contract: *Curtis v. Aspinwall*, 114 Mass. 193. It is true that in *Alna v. Plummer*, 4 Me. 258, it was held that, where real estate was sold at auction, a written memorandum made by the auctioneer, and a deed tendered to the purchaser, which he refused, the measure of damages against him was the price at which the land was struck off, with interest; but this case was criticised in *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25; S. C., 66 Am. Dec. 394; Sedgwick on Damages, 35; and upon more full consideration the rule was laid down as above, and to which the last case is cited. In other cases having nothing to do with auction sales, however, it is also true that decisions not in conformity with the ones laid down in the first part of this subdivision have been rendered, and which are contrary to the general rule, but they do not savor of its legal strength and solidity. Thus in *Richards v.*

Edick, 17 Barb. 265, it was held that, in an agreement relating to real estate, where the vendor tenders a deed and offers to perform, but meets with a refusal on vendee's part to perform his contract, the vendor may recover the purchase money in an action at law. In *Devine v. Himer*, 29 Iowa, 297, a case of land exchange, plaintiff recovered the value of the land which the contract required defendant to convey to him. In *Marshall v. Haney*, 4 Md. 508, S. C., 59 Am. Dec. 92, the value of the land at the time of the breach of the contract was held to constitute the measure of damages. In *Goodpaster v. Porter*, 11 Iowa, 161, where the obligor agreed to pay a price fixed on a day named for certain real estate if the obligee should elect to sell the same, it was held that the obligee, upon electing to sell, was entitled to recover the price named in the contract without regard to the value of the land at the time of such election. In *Tripp v. Bishop*, 56 Pa. St. 427, it was held that the measure of damages for vendee's breach of a parol contract to purchase land is not the price he agreed to pay; but that if the contract is in writing, and not within the statute of frauds, or if the contracting parties have done all that the statute requires, "there is no reason why a purchaser should not be held to pay what he promised; or in other words, why the price he undertook to pay is not the measure of damages for his breach of his contract." On validity of verbal contract, see *Meason v. Kaine*, 63 Pa. St. 339. And in *Wells v. Abernethy*, 5 Conn. 227, a case of land exchange, the court said: "The consideration of the contract is never the rule of estimating the damages for the breach of an express agreement. When by reason of a failure on the part of one of the contracting parties, or other legal cause, the contract is rescinded, either absolutely or at the election of the party injured, he may bring his suit for the consideration, and then it will be the measure of damages. But so long as the contract is open, and the action, as it necessarily must be, and as in this case it is, is brought upon it, the sum recoverable is the value of the thing stipulated at the time when and the place where it should have been performed." See the numerous cases there cited.

4. *Evidence of Damage—Forfeiture of Deposit—Penalty—Similarity of Rule concerning Real and Personal Property.*—In determining the market value of the land, the general cash value must be taken, and not its value for a particular purpose, or on time: *Lewis v. Lee*, 15 Ind. 500. This may be the value of the land sold at a subsequent and second sale, if such sale be conducted openly and fairly: *Adams v. McMillan*, 7 Port. 73; but the price at which the property may have been subsequently sold is not always proper evidence of its value; as in forced sales under foreclosure: *Wilson v. Holden*, 16 Abb. Pr. 133. Evidence of the second sale is competent, however, on the question of damages, when it is shown that there has been no material change in the market value of the property between the two sales: *Croak v. Owens*, 121 Mass. 28. And where the rule is applied that the value of the land at the time of vendee's breach of his contract constitutes the measure of damages, evidence of what its value was when the agreement of sale was made is irrelevant and inadmissible: *Marshall v. Haney*, 4 Md. 498; S. C., 59 Am. Dec. 92. A sum of money put up as a forfeiture does not release the purchaser from his obligation to take the property; but in an action by the vendor against him for not taking it, such sum will be considered by the jury in reduction of damages: *Curtis v. Aspinwall*, 114 Mass. 187; *Huler v. Burke*, 11 Serg. & R. 244. And where the forfeiture amounts to a penalty instead of stipulated damages, it will form no bar to such an action: See *Richards v. Edick*, 17 Barb. 260, in which the subject of forfeitures and penalties is discussed at length, and in which it is said that the burden of proof

that the parties intended a specified sum as stipulated damages is in him who maintains that side of the question, and he must establish it to the satisfaction of the court. When the vendee refuses to receive and pay for goods which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract price of the goods, but the difference between the contract price and the market price, or value of the same goods at the time when the contract was broken: *Gordon v. Norris*, 49 N. H. 376; *Stevens v. Lyford*, 7 Id. 360; *Woodbury v. Jones*, 44 Id. 209; *Haines v. Tucker & Co.*, 50 Id. 307; *McNaught v. Dodson*, 49 Ill. 446; *Schuebley v. Shirlcliff*, 7 Phila. 236; *Allen v. Jarvis*, 20 Conn. 38; *Hall v. Pierce*, 4 W. Va. 107; *Ganson v. Madigan*, 13 Wis. 67; *Chapman v. Ingram*, 30 Id. 290; *Lewis v. Greider*, 49 Barb. 606; *Hewitt v. Miller*, 61 Barb. 567; *Pollen v. Le Roy*, 30 N. Y. 549; *Dustan v. McAndrew*, 44 Id. 72. And the same rule should be, and is, applied in case of contracts for the sale of real estate where the vendee refuses to receive the deed and pay the price according to the contract: *Griswold v. Sabin*, 51 N. H. 171, reviewing the cases; *Adams v. McMillan*, 7 Port. 88; *Whiteside v. Jennings*, 19 Ala. 791; *Lewis v. Lee*, 15 Ind. 499; *Wells v. Abernethy*, 5 Conn. 227; see *Dayton, W. V. & X. T. Co. v. Coy*, 13 Ohio St. 91, reviewing the cases.

5. *Interest—Ejectment.*—Where the vendee in a contract for the purchase and sale of real estate takes possession of the property as owner without having paid the purchase money, he is bound to pay interest: *Stevenson v. Macwell*, 7 N. Y. 408. But where defendant has covenanted to convey land to plaintiff, by warranty deed, in consideration of other land granted to him by plaintiff, interest cannot be allowed by way of damages for the breach of such agreement until demand made by the plaintiff, succeeded by defendant's non-performance: *Wells v. Abernethy*, 5 Conn. 222. In contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase money, "and in case of a persistent default in the payments, his better remedy, and under some circumstances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give him a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement:" *Hansbrough v. Peck*, 5 Wall. 506. The vendor can maintain ejectment against vendee for unpaid balance of purchase money: Id.; *Stokely v. Trout*, 3 Watts, 163; *Pennock v. Freeman*, 1 Id. 401; but in such action plaintiff is only entitled to have a conditional verdict and judgment to be released upon the payment of the balance of the purchase money, at such time as the jury may prescribe. This rule, however, is peculiarly applicable to purchasers in possession, and who have made valuable improvements: *Dixon v. Oliver*, 5 Watts, 509.

6. *Title to Land—Title to Purchase Money.*—In support of what is deemed to be the just and true rule of damages in the case of an agreement for the purchase and sale of land, where the vendee refuses to perform his contract, viz., that it is the difference between the contract price and the actual market value at the time of the breach of the agreement, or at the time of trial if there has been any decrease in value, it is strongly argued that the title does not pass by a tender of the deed; nor does it pass by operation of law: *Richards v. Edick*, 17 Barb. 264; *Alna v. Plummer*, 4 Me. 258. The recovery of the purchase money cannot pass the fee of the land, and the legal seisin remains as at first. The vendor has not parted with his property, and if the land has not fallen in price he has lost nothing. In *Scuddler v. Wadding-*

ham, 7 Mo. App. 26, this question was referred to. There the defendant employed and authorized brokers to purchase from plaintiff, and the deed was tendered to the brokers, who, it was alleged, accepted it as defendant's agents. Plaintiffs asked judgment for the purchase money. The court said: "That the mere brokers took the deed must, as against the pleader, be considered equal to an averment that the defendant refused to accept it. But further: even supposing that the brokers, being 'thereunto duly authorized,' etc., did accept the deed, it is not alleged that the defendant ever took possession; yet if the purchase stopped short of completion, how can it be maintained that the property passed? If the vendee may refuse at one point, he may refuse at any. The tender of a deed is a step in the transaction, as the tender of a bill of sale might be for personal property; but if a bill is taken and the goods refused, does the property pass? On the basis of an ordinary action for damages, tender of a deed and refusal may be sufficient; for there is a breach, and the intention being shown, the vendor need not uselessly go further. But the vendee may refuse to complete the purchase by refusing to take the property. The property is then on the vendor's hands. The law, taking facts as it finds them, recognizes this. If the vendor retains the land or goods, the vendee is not to be fined in the amount of the purchase money. On the other hand, the injured party is to be compensated, not rewarded. He has his property; and his injury is the damage, measured in money, which he has suffered by the purchaser not taking it. If, indeed, the seller is not content with damages, he may have specific performance and get his purchase money. But he cannot get rid of the tests imposed by equity, by bringing a common-law action for the purchase price. At common law, upon a breach, his right of action accrues to him, and whether the mere subject-matter of the contract be lands or goods, the action is a personal right, which he may enforce until it is barred by the statute. But if the seller elects to take the purchase money, he must do so at once; and thus, on the basis that he is entitled to it, the money becomes his and the land becomes the property of the purchaser. The seller can become entitled to the purchase money only by, so far as in him lies, putting the purchaser in the seller's place. The seller cannot wait, as the argument of the plaintiffs implies he can, up to the time the right of action is barred by the statute of limitations, enjoying all the while the rents and profits of the estate, and then by a decree obtain the purchase money. The decree merely adds the sanction of equity to what was done by the parties, who, by their exchange, vested the title to the money in the seller and made the land the property of the purchaser. But it is only on the basis of prompt and persistent action to this effect on the part of the seller seeking his purchase money that he can obtain a decree."

7. *Suits on Promissory Notes Given for the Purchase of Land*.—Where a purchaser has given his promissory note for the payment of land which the vendor has agreed to convey to him, the vendor cannot sustain an action on the note where the property is so incumbered by judgments, etc., that it is impossible for the vendor to perform his agreement: *Lyon v. O'Kell*, 14 Iowa, 233; and the same is true where the aid of chancery is necessary to assist him in making title: *Hulshizer v. Lamoreux*, 58 Ill. 72. But if the vendee has gone into possession of lands which he has purchased and given his notes for, the vendor can maintain his action on the notes, and the vendee cannot avoid it on the ground that the vendor refuses to convey. The vendee's remedy is by compelling a performance: *Freleigh v. Platt*, 5 Cow. 494; *Chapman v. Eddy*, 13 Vt. 205; *Lewis v. McMillen*, 41 Barb. 420. Neither can the vendee avail himself in such action of a partial want, or partial failure of consideration:

Stephens v. Evans, 30 Ind. 39; *Lynch v. Baxter*, 4 Tex. 431; S. C., 51 Am. Dec. 735; *Carter v. Carter*, 1 Bailey L. 217; *Lewis v. McMillen*, 41 Barb. 420. And so long as the vendee remains undisturbed in his title, he cannot resist a recovery of the purchase money, on the ground of entire failure of consideration: *White v. Beard*, 5 Port. 94. Neither can he urge such defense, nor even fraud, where he has, while in possession, accepted from the vendor a deed with covenant of warranty: *Patton v. England*, 15 Ala. 69. So in probate sales the law of *caveat emptor* applies. The purchaser buys at his peril, and will not be relieved in equity from the payment of notes given for the purchase money, although he get no title, if there be no fraud, or mistake, or ignorance of any material fact: *Garrett v. Lynch*, 45 Id. 204. It seems, however, in Iowa, that where the conveyance is to be made upon payment of the purchase money, the two acts are dependent, the performance of one being a condition precedent and consideration for the other, and not independent promises, each constituting the consideration for the other. Thus it has been held that if the consideration of a note was real estate sold, the plaintiff must show that he has made and tendered, or offered to make and tender, to defendant, a conveyance of such estate before he can maintain an action upon the note: *School Dist. No. 2 etc. v. Rogers*, 8 Iowa, 316.

STATE v. INGOLD.

[4 JONES'S LAW, 216.]

IT IS EXCUSABLE HOMICIDE TO TAKE LIFE OF ADVERSARY when "sorely pressed" and in danger of death or great bodily harm.

COURT MUST SPECIFICALLY CHARGE JURY AS TO DEGREE OF CRIME COMMITTED. It is error to charge that the offense is, "at least," manslaughter.

INDICTMENT for murder. Defendant's counsel objected and excepted to the whole of the charge of the court, the latter part of which, not stated in the opinion, is as follows: "But that he might be guilty of murder, and would be if the jury believed that before entering into the fight he had formed a deliberate purpose to bring about a fight and use his knife, and in execution of that purpose he did bring about the fight and stab the deceased and kill him." The gist of the facts which were the basis for the charge are stated in the opinion.

Kittrell, appointed by the court, for the state, the attorney general being disqualified.

Bailey, and Fowle and Hill, for the defendant.

By Court, PEARSON, J. There is manifest error in the first proposition of law laid down by his honor: "If the prisoner willingly entered into the fight, and during its progress, however sorely he might be pressed, stabbed the deceased, as de-

scribed by the witnesses, his offense, at least, would be manslaughter."

By "sorely pressed," we understand being put to the wall, or placed in a situation where he must be killed or suffer great bodily harm, or take the life of his adversary. Supposing there was evidence to raise this point, the offense, according to all the authorities, was excusable homicide, which Foster calls self-defense culpable, but through the benignity of the law, excusable: Fost. Crown L. 273, 274; 1 East. Crown L. 279; 4 Bla. Com. 184; 1 Hale P. C. 482. Indeed, as the deceased made the first assault with a deadly weapon, *i. e.*, "a stone about the size of a goose-egg," thrown with violence at a short distance, and followed it up by pushing the prisoner against the jam of the fence, gave him two blows, and then caught him with his hand about the mouth, having him against the fence, bent over on the side, before the prisoner struck him at all, if the necessity for killing existed, which his honor assumed, it would seem to have been rather a case of justifiable homicide.

There is a further error in this proposition: his honor charged that the offense was, at least, manslaughter, emphasizing the words "at least." This left the jury uninstructed as to whether, in the opinion of his honor, it was manslaughter or murder, and they had reason to infer that he inclined to the opinion that it was murder, taking the case in its most favorable aspect. It was error to leave the jury in this state of uncertainty. At all events, it prepared the minds of the jury to lean against the prisoner in the next aspect in which the case was presented.

It was said in the argument for the state that as the jury found the defendant guilty of murder, which it was assumed they did upon the second aspect in which the case was presented, this error was harmless; and it was likened to a finding in a civil action, where the general issue and justification are pleaded, and the jury find for the defendant upon the general issue, which makes an error in the charge upon the plea of justification immaterial, so that it is not a sufficient ground for granting a *venire de novo*. The cases are not precisely analogous. In the latter there are two independent pleas, and the matters are distinct, and can easily be kept separate. Here there is but one plea, and it was difficult to keep the matters separate. In fact, there is no telling to what extent the jury, in considering the case in the second aspect in which it was presented, were influenced by the error in regard to the first. If the offense was in no aspect excusable homicide, and in the

most favorable aspect at least manslaughter, who can say that the jury did not find the prisoner guilty of murder upon the first aspect? His honor left the way open, and it may be that the consideration of the case in the second aspect, without satisfying them that it was the true view, had the effect of bringing their minds to the conclusion that the prisoner was guilty of murder upon the first aspect; or at any rate, of getting the matter so mixed up that they had no distinct idea or agreement among themselves whether they found him guilty of murder because, having entered into the fight willingly, he inflicted so horrible a stab with the knife, or because they were satisfied from the evidence that "before entering into the fight he had formed a deliberate purpose to bring about a fight and use his knife."

That this is the most reasonable way of accounting for the verdict which was given, after much hesitation, is confirmed by the fact, although we are not at liberty to say there was no evidence, yet the evidence was certainly very slight, that the prisoner had formed a deliberate purpose to bring about a fight and use his knife. It is true, while they were holding him in the piazza, he flourished his knife, and swore "one of us has to die before sunset;" but every one who has witnessed scenes of this kind knows that such "rearing and charging and popping of fists" are far from evincing a deliberate purpose, particularly when the opponent is a much stouter and more able-bodied man. The barking of a dog shows that he thinks it safer to bark than to bite.

As to bringing about the fight, the deceased bantered him, and said if he would come out he would whip him; the prisoner said he would go, although there was a whole parcel of them (from this it would seem he had but little stomach for the fight), to which the deceased replied very insultingly, and made the onset with the stone. It should be borne in mind that the prisoner and the deceased were before that day friendly; commenced drinking as friends. The prisoner wished to go to his work, but was persuaded by the deceased to continue in the carouse, and it was not until after they talked about hitting each other in the face that the prisoner used such furious language. Whether they had hit each other in the face does not appear; but something occurred which made the prisoner very angry. If he was hit in the face, then the oath that "one must die before sunset" amounts to nothing, because it was the effect of passion. If he had struck a mortal blow, the killing would

have been manslaughter, and surely words spoken in a passion, induced by legal provocation, ought not to have more effect than a mortal blow. We think the prisoner is entitled to have his case submitted to another jury. *Venire de novo*.

Judgment reversed.

KILLING OF ASSAILANT WILL BE JUSTIFIABLE HOMICIDE IN SELF-DEFENSE if there be an actual physical attack of such character as to afford reasonable ground to believe that the design is to destroy life, or commit felony upon the party assaulted: *State v. Chandler*, 52 Am. Dec. 599; *Shorter v. People*, 51 Id. 286, and prior cases collected in note 293; *Harrison v. State*, 60 Id. 450, note 452.

IN CHARGING JURY IN CRIMINAL TRIALS, all strong expressions as to the guilt of the accused should be carefully avoided: *State v. Chandler*, 52 Am. Dec. 599, and cases in note 603.

THE PRINCIPAL CASE IS CITED in *State v. Vinson*, 63 N. C. 337, to the point in the second subdivision of syllabus, *supra*. It is also cited in *State v. Chavis*, 80 Id. 357, to the point that such state of facts must exist as are given in the first paragraph of syllabus, *supra*, in order to constitute excusable homicide.

KRENS v. PEELER.

[4 JONES'S LAW, 226.]

IN CONVEYANCE BY DEED OF WIFE'S ESTATE, SHE MUST BE PARTY with her husband to the conveyance, and must be privately examined at the time that the deed is executed. It is not sufficient that at a subsequent period she signs and seals a deed previously made.

EJECTMENT. Verdict for plaintiff; judgment accordingly. Defendant appealed. The opinion states the facts.

Boyden, for the plaintiff.

Fleming and H. C. Jones, for the defendant.

By Court, NASH, C. J. Two questions are presented by the record. The one relative to the privy examination of the *feme covert* it is not necessary for us to consider. Another, which lies at the threshold of the defense, must be first disposed of. The land belonged in fee to Polly Kerns, who was the wife of Peter Kerns. Both of these persons died before the institution of this suit, and the lessor of the plaintiff is the heir at law of Polly Kerns. To meet this claim, the defendant alleges that Peter Kerns and his wife Polly, for valuable consideration, sold and conveyed the land in question to one Swink, under whom he claims. If the deed produced by the defendant does convey the right of Mrs. Kerns, then the title is out of the lessor, and the action cannot be supported. That deed constitutes a part

of the case, and operates only to convey to Swink the right, title, and interest which Peter Kerns had in the land, and which was for his life only. It conveys away no interest belonging to Mrs. Kerns; it does not purport even to do so. She is nowhere mentioned in the deed, but it evidences simply a contract between Peter Kerns and Swink. It is true, it attempts to convey the fee-simple, but it only conveys his interest. So far from its being the intention of the parties to embrace Mrs. Kerns's interest in the land when executed at that time, neither Kerns nor Swink appear to have known that she had any interest; at least, Swink did not.

The case states that some time after the execution of the deed, Swink learned that Kerns claimed the land through his wife, and being dissatisfied, upon his proposition Mrs. Kerns, with the approbation of her husband, signed her name to the deed. This sufficiently shows that the contract of bargain and sale was solely between Kerns and Swink, without any view to the interest of Mrs. Kerns. This brings us to the main question in the case: Did her signing and sealing the deed, under these circumstances, make her a party to it in law? We are of opinion that it did not. The conveyance from Kerns to Swink is dated the first of December, 1823, and some time afterwards Polly Kerns signed and sealed the deed. The deed to Swink was then executed, and he had taken possession before Polly Kerns attempted to execute it. For all the purposes of a conveyance, she might as well have signed and sealed a blank piece of paper. Our attention was called to the case of *Van Hook v. Barnett*, 4 Dev. L. 268; and to *Smith v. Crooker*, 5 Mass. 539. Neither of those cases control this. The action in the first was upon an administration bond, in which there was a blank left for the insertion of the names of the obligors. The name of Barnett was not inserted in the body of the bond, but he executed it with the other sureties. We take it that the obligors had all signed and sealed the bond before their names were inserted in the body of it, and the only question on this point was, that in order to bind Barnett, it was sufficient that he should have executed it. So in the case of *Smith v. Crooker*, *supra*, which was an action against a surety upon a bond, the surety signed the instrument before his name was inserted. The court held it to be immaterial. These decisions were correct, but they do not fit our case. There are cases showing that it is not, in all instances, necessary for parties' names to appear in the body of an obligation, if he executes it by signing and sealing,

as in the case of an obligation to pay money absolutely or conditionally. If the obligation begins, "we promise to pay," etc., all the parties who execute it are bound; or where in such an instrument a blank is left for the names of the obligors; but all these cases fall short, for the reason assigned hereinbefore to govern this. The conveyance by Peter Kerns takes not the slightest notice of any interest in the land possessed by the wife Polly. The deed was full and complete when Peter Kerns executed and delivered it, and the wife was no party to it. Nor did Swink bargain for her right, but for the husband's.

The only way whereby in our law a *feme covert* can convey her real estate is by joining her husband in the conveyance. It takes the place of the common-law assurance by fine. Justice Blackstone, in the second volume of his commentaries, page 355, says: "The fine is the usual, and almost the only safe, method whereby she can join in the sale, settlement, or incumbrance of any estate." In order to assure the estate of the *feme covert* to the cognizee, she must be a party to the whole proceedings, and be privily examined. This mode of conveyance never was in force in this state. The conveyance by deed of bargain and sale, accompanied by the privy examination of the wife, being more expeditious and less expensive. In analogy to the conveyance by fine, she must be a party with her husband in the conveyance at the time it is executed. It is not sufficient that at any subsequent period she signs and seals the deed so previously made. At the time she attempted to execute the deed her husband had no estate in it; she therefore could not join him in the sale at that time. The legal title to the premises is not in the defendant, but in the lessor of the plaintiff.

Judgment affirmed.

DEED OF FEME COVERT IS VOID IF IT DOES NOT APPEAR from the certificate of her acknowledgment that she was examined separately and apart from her husband, and stating that she voluntarily consented will not cure the defect: *Jourdan v. Jourdan*, 11 Am. Dec. 724; 22 Id. 100; *Livingston v. Kettelle*, 41 Id. 180; *Callahan v. Patterson*, 51 Id. 712, where it is held that privy examination apart from her husband is indispensable to conveyance of wife's separate property; see also notes to above cases; as to the validity of conveyances of married women's property generally, see notes to *Carr v. Williams*, 36 Id. 90; *Brunce v. Wood*, 35 Id. 381; conveyance by husband of wife's estate: See *Evans v. Kingsberry*, 14 Id. 779; *Payne v. Parker*, 25 Id. 221; *Baykin v. Ciples*, 29 Id. 67; *Youse v. Norcome*, 51 Id. 175; *Howey v. Goings*, 54 Id. 427.

THE PRINCIPAL CASE HAS BEEN CITED, and its doctrine approved and followed, in *Green v. Thornton*, 4 Jones L. 231; *Adams v. Hedgepeth*, 5 Id. 329; *Gray v. Mathis*, 7 Id. 504; *Barnes v. Haybarger*, 8 Id. 82; *Harris v. Jenkins*, 72 N. C. 186; *Scott v. Battle*, 85 Id. 188.

CASES
IN THE
SUPREME COURT
OF
OHIO.

HILL v. HIGDON.

[5 OHIO STATE, 243.]

LAWS AUTHORIZING CORPORATE AUTHORITIES OF CITIES AND VILLAGES TO LEVY SPECIAL ASSESSMENTS upon property particularly benefited, for the purpose of improving streets, are constitutional.

SUM EXACTED AS SPECIAL ASSESSMENT UPON PROPERTY PECULIARLY BENEFITED by street improvement is not a taking of private property for public use, and infringes no constitutional provision providing for the inviolability of such right.

SPECIAL ASSESSMENT LEVY UPON PROPERTY PARTICULARLY BENEFITED BY STREET IMPROVEMENT is an exercise of the taxing power, and the tax levied is for the purpose of constructing a public improvement.

RIGHT OF TAXATION IS INSEPARABLE INCIDENT OF SOVEREIGNTY, delegated in the general grant of legislative authority, and, the provision against poll-taxes excepted, is subject to no express limitations or restrictions, when used by the legislature as a means to accomplish a lawful purpose.

POWER TO TAX FOR LAWFUL PURPOSE NECESSARILY INCLUDES POWER to determine the extent and upon what property the tax should be levied.

TAXATION AND ASSESSMENT ARE REGARDED AS DISTINCT MODES OF RAISING MONEY FOR DIFFERENT PURPOSES, and founded upon different principles. Taxation is a general burden imposed for supporting the government, and the revenue raised is expended for the equal benefit of the public at large. Assessment rests upon the taxing power, but describes a distinct and well-known mode of laying a local burden upon particular property, with reference to the peculiar and special benefit derived to such property from expenditure of the money.

OHIO CONSTITUTION OF 1851, SECTION 6, ARTICLE 13, CONTEMPLATES DELEGATION OF POWER OF TAXATION, in all its forms, to municipal corporations, with no other limitation upon this power than that it shall be so restricted by the legislature as to prevent an abuse of its exercise; but a

failure to perform this duty lays no foundation for judicial correction. The principles in section 2, article 12, upon which all taxes for general revenue purposes must be levied, do not include special assessments.

ERROR to the district court of Hamilton county. Hill owned a lot in Cincinnati, fronting fifty-one feet on Seventh street. The city council passed an ordinance to regrade and pave Seventh street, and to assess the expense of so doing according to the provisions of the act of March 20, 1850, "further to amend the charter of the city of Cincinnati," and of the general ordinance of June 12, 1850, upon the subject of special taxes for the improvement of streets, etc. On October 21, 1851, about a month after the ordinance was passed, Higdon contracted with the city to do the work; and to pay for the expense incurred, the city council, on November 3, 1851, assessed a special tax of one dollar and sixty-six cents and seven mills per front foot for each front foot on Seventh street between two stated points, and on the line between which a part of Hill's land fronted. Hill, with other property owners on Seventh street, was ordered to pay the assessment on his lot within twenty days from the date of the ordinance, or be subject to penalty and interest. Hill refused to pay the assessment, and on December 1, 1851, Higdon sued him for the amount of it before a justice of the peace. An appeal was taken to the common pleas of Hamilton county, where the question of the constitutionality of the law providing for the assessment was raised by special demurrer to the declaration. This was overruled, and judgment was rendered against Hill, with interest and costs. The district court affirmed this judgment, and to reverse the judgment of the district court was this petition prosecuted.

A. P. Hill and J. T. Crapsey, for the plaintiff in error.

Corwine, Hayes, and Rogers, for the defendant in error.

By Court, RANNEY, C. J. The real question upon which the parties are at issue, and which has been fully argued, is this: Can laws authorizing the corporate authorities of cities and villages to levy a special assessment upon property particularly benefited, for the purpose of improving streets, continue in force or be now passed consistently with the present constitution of the state?

Upon this question, involved in several other cases before us, as well as in this, the court have bestowed the most careful attention, and I now proceed to state the conclusion to which they have arrived. The subject is very important in its practical

bearings, and not without serious difficulty; and for myself, I am bound to admit that the doubts which I at first entertained have not been entirely removed. But it is not upon doubts that this case is to be decided. The question can only be solved by a construction of several provisions of the constitution; and a proper construction can only be given when the intention of those who framed and adopted that instrument is ascertained. We are bound to presume that the general assembly have continued to pass laws conferring this authority, upon a settled conviction of their power to do so; and it is only when a clear incompatibility between the constitution and the law is made to appear that the courts are authorized to interfere. We cannot overturn in doubt what they have established in settled conviction: *Cincinnati, W. & Z. R. R. v. Commissioners of Clinton County*, 1 Ohio St. 77.

Laws of the character of those now drawn in question are no novelty in this state. Their origin is nearly coeval with our legislative history, and they have continued to multiply, as occasion has required, from that time to the present. Indeed, so true has this been that there is no hazard in affirming that the authority they give has been almost uniformly one of the important powers conferred upon municipal corporations. Nor has their consistency with our first constitution remained unchallenged. In at least two well-considered cases, every objection that could be suggested has been answered, and their constitutionality fully affirmed: *Bonsal v. Lebanon*, 19 Ohio, 418; *Scovill v. City of Cleveland*, 1 Ohio St. 127.

It is no part of my purpose to go again over the ground covered by those decisions. It was there shown, with what of clearness and force the judges delivering the opinion were capable of employing, that the sum exacted was not a taking of private property, within the meaning of the constitution; and consequently, that the article providing for its inviolability was not infringed. That it was an exercise of the taxing power, and the sum demanded, a tax levied for the purpose of constructing a public improvement. That the right of taxation was an inseparable incident of sovereignty, delegated in the general grant of legislative authority, and when used by the general assembly as a means to accomplish a lawful purpose, was subject to no express limitations or restrictions but the provision against poll-taxes. That the right to tax for such a purpose necessarily included the power to determine the extent and upon what property the tax should be levied, and that its imposition upon the property particularly and specially benefited by the improve-

ment, was but a lawful exercise of the discretion with which the legislative body was invested in apportioning the tax.

That it was a power liable to abuse, and very often abused, was conceded, but as the people had made a plenary delegation of authority, and had imposed no positive restrictions upon its exercise, it was thought to be clear that they had relied for protection upon the wisdom and justice of the representative body, and the accountability of its members to them, rather than the restraining powers of the courts of law.

We see no reason to doubt the correctness of these conclusions; and their application to the present controversy demonstrates the entire inapplicability of those provisions of the present constitution which provide for the inviolability of private property, and regulate the exercise of the right of eminent domain, and leave nothing but the question whether the principles or mode of assessment upon which such taxes are levied are inconsistent with any of the provisions of this constitution. That the twelfth article was intended to impose, and has imposed, most important limitations and restrictions upon the taxing power, is certainly true; and that any substantial departure from the principles therein established, in the cases to which the provisions of that article extend, is such an invasion of the constitutional rights of the citizen as to call for the interposition of the judiciary, may be deemed equally certain.

By the positive terms of the second section of that article, "laws shall be passed taxing, by a uniform rule, all moneys, etc., and also all real and personal property, according to its true value in money." In the case of *City of Zanesville v. Richards*, 5 Ohio St. 589, decided at the present term, we have held that this section is equally applicable to and furnishes the governing principle for all laws levying taxes for general revenue, whether for state, county, township, or corporation purposes; and that it requires a uniform rate per cent to be levied upon all property, according to its true value in money, within the limits of the state, or the local subdivision for which the revenue is collected. The general assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property and in what proportion the burden shall be laid. A uniform rate per cent must be levied upon all property subject to taxation, "according to its true value in money," so that all may bear an equal burden. If laws of the character of those now under investigation are controlled by this section, it is evident they cannot be sustained. They do not impose the

tax upon all the property of the city or village, nor is it apportioned according to the true value in money of the property upon which it is laid. As the mode prescribed in this section is sufficient to enable municipal corporations to raise a revenue for the accomplishment of all their legitimate purposes, had the constitution contained nothing further to evince the intention of its framers, it might be argued (and I think conclusively) that any other mode of levying taxes for any purpose was necessarily excluded. But it does contain a further provision, which every sound rule of construction binds us to regard, and which seems utterly inconsistent with such a conclusion. By the sixth section of the thirteenth article, the general assembly is required to "provide for the organization of cities and incorporated villages by general laws, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." It is very clearly our duty to give effect to the natural and obvious import of the language of this section. It relates to the organization of cities and villages, and imposes upon the general assembly the very important duty of so restricting the powers it was supposed they would possess as to prevent their abuse. Amongst these is the power of "assessment." This power had for many years been in constant and active exercise in every part of the state, and was perfectly understood by every member of the convention. The popular as well as legal signification of this term had always indicated those special and local impositions upon property in the immediate vicinity of an improved street which were necessary to pay for the improvement, and laid with reference to the special benefit which such property derived from the expenditure of the money. They had always differed widely from the ordinary levies made for the purpose of general revenue. To confound them now, in giving a construction to the second section of the twelfth article, is to make not only unmeaning, but utterly absurd, a material part of the sixth section of the thirteenth article. To restrict or regulate the exercise of a power furnishes the strongest possible implication of its existence; and to impose upon the general assembly the duty to do this in respect to a power which did not exist, or which had been expressly prohibited, would be nothing better than nonsense.

It is our duty to give such a construction to the constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions. To do this, we

have only to suppose that the convention used language with reference to its popular and received signification, and applied it as it had been practically applied for a long series of years; that where taxation is spoken of in the second section of the twelfth article reference is made to the general burdens imposed for the purpose of supporting the government, and the revenue raised expended for the equal benefit of the public at large; while the power of assessment, referred to in the sixth section of the thirteenth article, although resting upon the taxing power, was intended to describe a distinct and well-known mode of laying a local burden upon particular property, with reference to the peculiar and special benefit derived to such property from the expenditure of the money. The general language of the first of these sections is thus only so far restricted as to give effect to the specific provision contained in the last. By the first, as the money is raised and expended for the equal benefit of all, no discretion is left with the general assembly; but the tax must be levied equally upon all property, and according to its true value. But in the exercise of the power of assessment, legislative discretion in apportioning the burden according to benefits is left as broad and unfettered as under the constitution of 1802. The last of these sections contemplates a delegation of the power to municipal corporations, and imposes upon the legislature the duty (as yet very imperfectly performed) of so restricting its exercise as to prevent abuse. A failure to perform this duty may be of very serious import, but lays no foundation for judicial correction.

The language of this section furnishes very strong evidence that the convention carefully discriminated between taxation and assessment, and regarded them as distinct modes of raising money for different purposes and upon different principles, from the fact that both terms are employed, and both are required to be restricted when used by cities and villages. The origin and history of the section lead to the same conclusion. It is almost a literal copy of the ninth section of the eighth article of the constitution of the state of New York. From the case of *People v. Mayor etc. of Brooklyn*, 4 N. Y. 440 [55 Am. Dec. 266], it appears that this mode of taxation had been much complained of in that state, and that an attempt was made in the convention of 1846 to effect its abolition. To this end the subject was referred to a committee, who reported a section for that purpose. But the convention refused to adopt it, and finally incorporated the provision as it now stands in the constitution of that state, and as it is found in ours.

Upon this provision Judge Ruggles remarks: "Instead of abolishing the system of assessments, this section of the constitution refers it to the legislature for the correction of its abuses. The direction given to restrict the power of cities and villages to make assessments presupposes and admits the existence of a power to be restricted. The constitution, therefore, in this section, recognizes and affirms the validity of the legislation by which city and village assessments for local purposes, like that now in controversy, are authorized; and seems to remove all doubt in relation to the legislative power in question."

It cannot be supposed that those who borrowed this provision from the New York constitution were ignorant of the objects and purposes for which it was there adopted; and it is but fair to presume that it was intended to effect the same purposes and objects here. In our present constitution, as well as in the former, the general grant of legislative authority includes the power of taxation in all its forms. Restrictions upon its exercise are to be looked for in other parts of the instrument. The second section of the twelfth article has established the principles upon which all taxes for general revenue purposes must be levied; but it does not extend to what was then, and is still, well known as special assessments, because the sixth section of the thirteenth article shows that they were not intended to be included. Dealing with them under the name of "assessments," the people have contented themselves with enjoining upon the legislature the duty of preventing abuses, by restricting the power of the cities and villages to impose them.

As to the policy or justice of such legislation, very different opinions might be entertained. But in that view it should be remembered that most of the improvements in towns and cities had already been made at the expense of the adjoining lot-owners. To subject them again to taxation, to improve other streets for the especial benefit of those owning lots upon the improvement, would in many cases work very great injustice. The evil, if evil it was, had been so long continued as to make it doubtful whether its correction or toleration would be attended with the greater injustice.

Upon the whole, we are satisfied that the law under which this assessment was made is not so clearly repugnant to any provision of the constitution as to authorize us to refuse its enforcement; and that this judgment should be affirmed.

BARTLEY, J., dissented.

LEGISLATURE MAY CREATE CORPORATE BODIES FOR MUNICIPAL PURPOSES WITH POWER TO TAX: *City of Lexington v. McQuillan*, 35 Am. Dec. 159; *Harrison v. Mayor of Vicksburg*, 41 Id. 633; *Battle v. Mobile*, 44 Id. 438; *Hope v. Deaderick*, 47 Id. 597; and changing the mode of taxation by adoption of a new constitution does not take away the power of a municipal corporation to tax, previously given by statute, if the mode was not specified in the statute granting the power: See case last cited.

RIGHT OF LEGISLATURE TO TAX PARTICULAR CITY FOR LOCAL IMPROVEMENT, with the consent of the local authorities, is as clear as the right to lay a general tax for any purpose whatever: *Sharpless v. Mayor of Philadelphia*, 59 Am. Dec. 759; *Williams v. Cammack*, 61 Id. 508.

ASSESSMENT FOR PUBLIC IMPROVEMENTS AS REGARDING STREETS, ETC., may be made according to benefits conferred: *People v. Mayor of Brooklyn*, 55 Am. Dec. 266; and extensive note thereto 285, on constitutionality of assessments: *Nichols v. City of Bridgeport*, 60 Id. 636, and notes thereto 649; *Taylor v. Comm'rs of Newberne*, 64 Id. 566, and references in note 573; *Moale v. City of Baltimore*, 61 Id. 276; *Williams v. Cammack*, Id. 508, and note 519; *Louisville etc. R. R. Co. v. County Court*, 62 Id. 424, and note 456.

ASSESSMENT FOR LOCAL IMPROVEMENT IS EXERCISE OF TAXING POWER: See note to *People v. Mayor of Brooklyn*, 55 Am. Dec. 286, and numerous cases cited therein; and cases cited in note to *Nichols v. City of Bridgeport*, 60 Id. 649.

CONSTITUTIONAL PROVISION WHICH FORBIDS PRIVATE PROPERTY TO BE TAKEN FOR PUBLIC USE is not involved in a question concerning taxation: *People v. Mayor of Brooklyn*, 55 Am. Dec. 266; *Sharpless v. Mayor of Philadelphia*, 59 Id. 759; *Williams v. Cammack*, 61 Id. 508; *Louisville etc. R. R. Co. v. County Court*, 62 Id. 424.

DISTINCTION BETWEEN TAXATION AND ASSESSMENT: See note to *People v. Mayor of Brooklyn*, 55 Am. Dec. 289, and numerous cases cited therein; *Sharpless v. Mayor etc. of Philadelphia*, 59 Id. 759.

DISTINCTION BETWEEN TAXATION AND RIGHT OF EMINENT DOMAIN: *People v. Mayor of Brooklyn*, 55 Am. Dec. 266; *Sharpless v. Mayor etc. of Philadelphia*, 59 Id. 759; *Moale v. City of Baltimore*, 61 Id. 276.

JUDICIARY CANNOT INQUIRE INTO WISDOM OR PROPRIETY OF LEGISLATIVE ACT: *Donahue v. Richards*, 61 Am. Dec. 256, and cases cited in note thereto 275; *Louisville etc. R. R. Co. v. County Court*, 62 Id. 424; *Taylor v. Comm'rs of Newberne*, 64 Id. 566.

POWER OF TAXATION IS WITHIN EXCLUSIVE DOMAIN OF LEGISLATURE, unless limited or restrained by constitutional provisions: See *Harrison v. Mayor of Vicksburg*, 41 Am. Dec. 633; *Battle v. Mobile*, 44 Id. 438; *People v. Mayor of Brooklyn*, 55 Id. 266, and numerous authorities in note thereto 287; extensive note to *City of New Albany v. Meekin*, 56 Id. 523, as to place where property may be taxed; *Sharpless v. Mayor of Philadelphia*, 59 Id. 759; *People v. Coleman*, 60 Id. 581, and notes thereto 595; *Nichols v. City of Bridgeport*, 60 Id. 636.

TAXING POWER IS NOT ALTOGETHER ARBITRARY. Equality, as far as practicable, and security of property against irresponsible power, must govern the legislature in the exercise of the taxing power; and taxation, though not universal, must be general and uniform: *City of Lexington v. McQuillan*, 35 Am. Dec. 159.

APPORTIONMENT OF TAXES AND ASSESSMENTS: See extended note to *People v. Mayor of Brooklyn*, 55 Am. Dec. 288, discussing the matter.

THE PRINCIPAL CASE WAS FOLLOWED in *Incorporated Village of Marion v. Epler*, 5 Ohio St. 250; *Northern Indiana R. R. Co. v. Connelly*, 10 Id. 159; *Baker v. City of Cincinnati*, 11 Id. 534; *Maloy v. City of Marietta*, Id. 636; *Cincinnati Gaslight and Coke Co. v. State*, 18 Id. 237; *City of Cleveland v. Wick*, Id. 303; *Sessions v. Crunkilton*, 20 Id. 349. And it was cited in *Reeves v. Treasurer of Wood Co.*, 8 Id. 336, where it is stated that the conclusions arrived at in the principal case rest upon a foundation of reason unanswerable and impregnable. And in the same case, p. 338, a decision under the New York constitution of 1846 was referred to as presenting a similar question to that in the principal case, and where the same principles were asserted and distinctions defined. In *Northern Indiana R. R. Co. v. Connelly*, 10 Id. 162, the principal case was cited to the point that the right of municipal corporations, under the constitution of 1851, when empowered by their respective charters, to impose special or local assessments upon property in the immediate vicinity of a public improvement, as distinguished from the power of general taxation, is no longer to be regarded as an open question in Ohio; and as establishing the law that such assessment may be made in proportion to the feet front, as well as upon the value of the lands as assessed for taxation. In *Baker v. City of Cincinnati*, 11 Id. 541, the court said: "But even as to property, it has been held that an assessment is not 'taxing,' within the meaning of section 2 of article 12. It has been so held, not only on the limited ground that it is admitted in cities and villages, under section 6 of article 13 of the constitution [citing the principal case], but on the broader ground that 'the power to authorize assessments as distinguished from taxes proper is comprehended in the general grant of legislative power to the general assembly,'" citing *Reeves v. Treasurer of Wood Co.*, *supra*. In *Maloy v. City of Marietta*, 11 Id. 638, in referring to the constitutional duty imposed upon the legislature to restrict the powers of taxation, assessment, etc., conferred upon municipal bodies so as to prevent the abuse of such power, the following sentence of the principal case was quoted: "A failure to perform this duty may be of very serious import, but lays no foundation for judicial correction." In *Cincinnati Gaslight and Coke Co. v. State*, 18 Id. 242, the principal case was cited to the point that section 2 of article 12 of the constitution of 1851 is only applicable to and furnishes the governing principle for all laws levying taxes for general revenue, whether for state, county, township, or municipal-corporation purposes. In *City of Cleveland v. Wick*, Id. 308, it was cited to show that nothing is better settled under the provisions of the new constitution than the existence of this power of local assessment. In *Sessions v. Crunkilton*, 20 Id. 358, it was cited to show that making assessments is not within the meaning of the word "taxing," as used in section 2 of article 12 of the constitution of 1851. In *Corry v. Campbell*, 25 Id. 142, the constitutionality of act providing for the organization of cities and incorporated villages was reaffirmed, and the principal case cited as authority. In *Gest v. City of Cincinnati*, 26 Id. 281, it was cited to the point that the provision of the municipal code authorizing a personal judgment against the lot-owner for an assessment is constitutional. And this is so because the statute creating the liability is constitutional. In *Western Union T. Co. v. Mayer, Treasurer, etc.*, 28 Id. 521, the following quotation was made from the principal case: "In our present constitution, as well as in the former, the general grant of legislative authority includes the power of taxation in all its forms. Restrictions upon its exercise are to be looked for in other parts of the instrument." In *Cincinnati, H. & D. R. R. Co. v. Sullivan, Treasurer, etc.*, 32 Id. 157, that part of the principal case referring to the popular as well

as legal signification of the term "assessments" was quoted; and in *Chamberlain v. Cleveland*, 34 Id. 551, the principal case was cited to show that the assessment imposed by a municipal corporation upon private property specially benefited by local improvements to pay for such improvements is confined to such property and limited to the value of the special benefits conferred. Numerous cases from other states are also cited to the same point. In the same case, p. 563, that part of the principal one referring to the popular as well as legal signification of the term "assessment" was quoted with approval. In *State v. Hipp*, 38 Id. 225, it was said that the power to license certain classes of business, impose a charge therefor in the form of a tax, and enforce the payment of the tax as a condition precedent to the lawful prosecution of the business is well settled, but that this relates only to employments which, in one form or another, impose burdens on the public. Such tax, it was said, cannot be imposed merely for general revenue, and the principal case was cited to show that the only mode of raising such revenue, whether for state, county, township, or municipal-corporation purposes, is found in article 12 of the constitution. And in the same case, p. 232, the principal one was cited to show that such a construction should be given to a constitutional provision as will make it consistent with other provisions, and harmonize and give effect to all as a whole. "To do this," said the court, "we have only to suppose the convention used such language with reference to its received signification, and as it had been practically applied for a long series of years."

LESSEE OF MERRITT v. HORNE.

[5 OHIO STATE, 307.]

ACTUAL SEISIN BY WIFE DURING COVERTURE IS NOT NECESSARY to entitle husband to curtesy, in Ohio.

GUARDIAN OF INFANT WAS AUTHORIZED TO APPEAR FOR HIS WARD and consent that partition should be made, under the partition act of 1820, 2 Chase's Statutes, 1162.

RECORD IMPORTS ABSOLUTE VERITY in all judicial proceedings of a court of record of competent jurisdiction.

PRIMA FACIE JURISDICTION OVER WARD IS SHOWN by the finding of a court that the person assuming to act as guardian was such in fact.

ESTOPPEL.—WHERE INDIVISIBLE PREMISES HAVE BEEN SOLD UNDER PARTITION PROCEEDINGS, and the husband of the infant, acting as her guardian, with a full knowledge of the facts, acknowledges the former guardian and receives from him the proceeds of the sale of such property, he will be estopped to prove that such person was not duly appointed, and cannot, after the wife's death, deny the court's jurisdiction over the infant. Such estoppel is equally effectual at law and in chancery.

IN SALE OF PROPERTY UNDER PARTITION ACT OF 1820, 2 CHASE'S STATUTES, 1162, DEED OF CONVEYANCE from the sheriff, duly executed, was made necessary to a complete execution of the power of sale, and indispensable to invest the purchaser with the legal title. And it must have been signed and sealed by the sheriff in the presence of witnesses; and such signing and sealing acknowledged by him in open court.

WANT OF SEAL IN SHERIFF'S DEED DULY ACKNOWLEDGED IS FATAL DEFECT, where the deed, in order to be valid, is required to be signed, sealed, and acknowledged; and the addition of a seal many years afterwards, without another acknowledgment, will not make it available, in a court of law, to protect the purchaser, in an action of ejectment brought by an infant or one who has succeeded to her estate.

EJECTMENT by plaintiff against defendant. Judgment for defendant. The present proceeding in error, to the district court of Hamilton county, was brought to review such judgment. The facts show that in 1827 John Dunseth died intestate, seised of one undivided fourth part of certain lands named in the record, and left Margaret and David, his only children and heirs at law. Shortly afterwards the mother was appointed guardian for her children, Margaret then being twelve years old. In May, 1829, the mother died and left her will, in which she requested Daniel H. Horne to become the guardian of her children. He consented, and acted as such, but it seems that he was never chosen or appointed by the court to act in such capacity. If he was so chosen or appointed, there was no minute entry of such choice or appointment; and it did not appear that he ever gave bonds as such guardian. Daniel H. Horne and James Patterson, in 1827, purchased an undivided fourth part of the same premises; and in 1829 said Horne and Andrew W. Patterson, the brother of James, purchased a like interest therein. Stephen Johnson and wife owned the remaining undivided fourth part of said premises, and immediately after the purchase just named filed a petition for partition, and made the other parties in interest above named defendants thereto. Process was served upon the Pattersons and Horne, and said Horne, as guardian for the minor heirs. Defendants answered, and Margaret and David, by Daniel H. Horne, their guardian, waived notice, and consented to the prayer of said petition, stating the interests held by each. A decree was entered showing service of process, consent, etc., and said Horne, "who is legally appointed guardian of the said Margaret Dunseth and David Dunseth, who are minors and heirs of John Dunseth, deceased, also having appeared in open court and consented to the partition of said lands on behalf of his wards;" and the court being satisfied said partition should be made, ordered a writ of partition to issue. The writ issued, and said premises, not being divisible, were appraised at eleven thousand four hundred dollars. The appraisement was confirmed, and no one of the parties electing to take the premises at the appraised value, a sale was ordered. So they were

sold at public auction on October 16, 1829, to Andrew W. Patterson, who purchased for himself and brother, for eleven thousand five hundred dollars, cash paid, and who afterwards let Mr. Horne in for half the purchase. The sale was confirmed and a deed ordered. On November 24, 1829, the sheriff made out and delivered such deed to the purchaser, but omitted to put his seal to it, though it was stated in the attesting clause that his hand and seal were set to such deed. After the sheriff went out of office in 1847 a seal was affixed to said deed. Subsequent to the sale and deed, possession had been held under them by the purchaser and those claiming under him. James P. Merritt, the lessor of the plaintiff, on February 3, 1833, married Margaret Dunseth, by whom he had a child, Mary Adelia. Margaret died in 1835, and her child, Mary Adelia, died in 1838, leaving the said David Dunseth her heir at law. Daniel H. Horne, as the guardian of Margaret Dunseth, filed his account as such on January 23, 1833. In it he charged himself with one thousand four hundred and sixty-six dollars and thirteen cents, received from the sheriff proceeds of the above-described sale of property, less the costs on said partition proceedings. The account showed a balance due his ward of one thousand and eighty-one dollars and seventy-eight cents. On March 23, 1833, Margaret Dunseth, then seventeen years of age, chose her husband, James P. Merritt, the lessor of plaintiff, as her guardian, who was thereupon appointed as such, he giving a bond, etc. On March 25, 1833, James P. Merritt, as guardian of his wife, gave to Horne, on settlement in full, a receipt for the said balance above; recognized him in such instrument as the former guardian of his wife, and released and exonerated him therein, after approving said balance, from all further claims on the part of Margaret. Daniel H. Horne, on September 2, 1847, obtained a quitclaim deed from David Dunseth, and Margaret (late Johnson) Kirby and her husband, who had brought suit, but made an amicable settlement of their claim. The court below gave judgment, upon the facts above stated, against Merritt's claim to curtesy in said land, and this proceeding to review that decision presents the following questions: 1. Does the fact that there was no actual seisin during coverture bar Merritt from curtesy in the land? 2. In the partition proceedings, did the court obtain jurisdiction over the infant Margaret, afterwards Merritt's wife? 3. Is Merritt, by the receipt of March 25, 1833, estopped to deny that Horne was guardian, or that the court had obtained such jurisdiction? 4. If the partition proceedings

and sale were valid, are they, without a deed, or with a deed in conformity with them but without a seal, sufficient to protect the defendant, holding under the purchase, in an ejectment by Merritt, who sues for curtesy in the land? 5. If not, did the seal afterwards affixed to the deed cure the original defect in that respect?

J. H. Jones and J. B. Eaton, for the plaintiff.

Worthington and Matthews, for the defendant.

By Court, RANNEY, C. J. In deciding this case, I shall do no more than state the conclusions to which the court have arrived upon the several questions presented. It has been fully and ably argued by counsel, and the ground upon which these conclusions are based and their application to the facts will be made apparent by the publication of a synopsis of those arguments.

We have again carefully examined the doctrine announced in *Borland's Lessee v. Marshal*, 2 Ohio St. 308, that an actual seisin of the land of the wife during coverture is not necessary to entitle the husband to curtesy in this state, and are fully satisfied of its correctness.

By the partition act of 1820, 2 Chase's Stat. 1162, the guardian of an infant was authorized to appear for his ward and to consent that partition be made; and it is expressly declared that "the same shall be deemed as valid and effectual in law to every intent and purpose as if the same had been done by such minor after his arrival at full age."

In this, as in all other judicial proceedings of a court of record of competent jurisdiction, the record imports absolute verity, and the finding of such a court that the person assuming to act as guardian was in fact such is sufficient *prima facie* to show that the court had obtained jurisdiction over the ward.

If upon the report of an inquest that the property will not divide, and the consequent sale of the land under such a proceeding, the husband of the infant, acting as her guardian, with a full knowledge of the facts, acknowledges such person to have been guardian, and receives from him as such the consideration money for the property, he will be estopped to prove that such person was not duly appointed, and cannot after the death of the wife controvert the jurisdiction of the court over the infant.

There is now no principle better settled, or resting upon firmer grounds of justice and public policy, than that which precludes a party who has induced another to part with his money or property, and has taken the fruits of a judicial proceeding, from after-

wards questioning its regularity, or by evidence *aliunde* impairing its effect: *Buckingham v. Hanna*, 2 Ohio St. 551; *Tabler v. Wiseman*, Id. 216. Although this doctrine debars the truth in the particular case, yet, as said by the supreme court of the United States in *Van Rensselaer v. Kearney*, 11 How. 326, "it imposes silence on the party only when, in conscience and honesty, he should not be allowed to speak." And we are of the opinion that it is equally effectual at law and in chancery.

By the act to which reference has been made, in case of a sale of the property upon proceedings in partition, a deed of conveyance from the sheriff, duly executed, was made necessary to a complete execution of the power, and indispensable to invest the purchaser with the legal title. The deed required must have been signed and sealed by the sheriff in the presence of witnesses, and such signing and sealing acknowledged by him in open court. An instrument of writing duly acknowledged, but without being sealed by the sheriff, is insufficient; and the addition of a seal many years after, without another acknowledgment, will not make it available in a court of law to protect the purchaser in an action of ejectment brought by the infant, or one who has succeeded to her estate.

Judgment reversed and cause remanded.

SEISIN IN FACT ON PART OF WIFE is not essential to constitute the husband tenant by curtesy; seisin in law is sufficient: *Jackson v. Johnson*, 15 Am. Dec. 433. To be tenant by curtesy, wife must be seised in deed: *Stevens v. Smith*, 20 Id. 205. Tenancy by curtesy may be had in lands of the wife of which she had only a seisin in law, they being wild and uncultivated, and not adversely possessed: *McCorry v. King's Heirs*, 39 Id. 165. Husband becomes tenant by curtesy of waste or uncultivated lands owned by the wife, and not held adversely, the other necessary incidents existing, she being deemed seised in fact, so as to entitle the husband to this right: *Wells v. Thompson*, 48 Id. 76.

SILENCE OF PARTY HAVING FULL KNOWLEDGE OF HIS OWN RIGHTS, so as to intentionally permit others to be deceived and misled in relation to them, will conclude him from afterwards interposing his claim to the prejudice of the party thus deceived or misled: *Titus v. Moree*, 63 Am. Dec. 665; see also note to *Chataque Co. Bank v. White*, 57 Id. 452. But an equitable estoppel never takes place unless the party seeking to avail himself of it has been actually misled: *Jewett v. Miller*, 61 Id. 751.

RECORD IS ENTITLED TO GREAT SANCTITY IN LAW, but if imbued with fraud, it must give way before credible sworn testimony: *Lowry v. McMillan*, 49 Am. Dec. 501.

DEED WITHOUT SEAL CANNOT OPERATE TO PASS LEGAL TITLE: *Floyd v. Ricks*, 58 Am. Dec. 374; and where omission of seals or scrolls to deed raises a cloud over the title to land, the same should be rectified before a sale is made, under a deed of trust, to secure the purchase money: *Bryan v. Stump*,

56 Id. 139. To constitute a sealed instrument under the statute, it must express in its body that it is sealed, and the persons executing it must affix scrolls by way of seals. But a flourish in continuation of the last letter of a name upon the affixing of a signature is not such a scroll as will constitute a seal, where it is not made by way of seal, though the instrument to which the signature is affixed expresses on its face that it is sealed: *Grimley v. Riley's Adm'rs*, 32 Id. 319. For other cases on what constitutes sufficient seal, see collected cases in note to *Davis v. Burton*, 36 Id. 514. That scroll must be recognized in body of instrument as a seal, see *Cromwell v. Tate's Ex'r*, 30 Id. 506.

THE PRINCIPAL CASE WAS FOLLOWED in *Lessee of Merrill v. Tweed*, 5 Ohio St. 319; referred to with approval in *Watkins v. Thornton*, 11 Id. 370; and cited in *Conover v. Porter*, 14 Id. 454, to the point that an estoppel *in pais* is equally effectual in law and in equity.

COMMISSIONERS OF LUCAS COUNTY v. HUNT.

[5 OHIO STATE, 488.]

WHERE DONATIONS HAVE BEEN MADE BY CERTAIN CITIZENS OF COUNTY TO PROCURE COUNTY SEAT TO BE LOCATED IN CERTAIN PLACE, and the county seat is located there in consideration of such contributions, but afterwards removed, and the county, notwithstanding such removal, claims the property and the right to use and dispose of it for other purposes than those for which the property was given, there is a clear moral obligation on the part of the county to either give up the property, or make compensation therefor, after the county seat is removed; and the donors in such a case may possibly invoke the aid of chancery.

WHERE DONATIONS HAVE BEEN MADE BY CITIZENS OF COUNTY TO HAVE COUNTY SEAT LOCATED AT CERTAIN PLACE, and the county seat is there located in consideration of such contributions, but afterwards removed, and the county, notwithstanding such removal, claims the property and the right to use and dispose of it for other purposes than those for which the property was given, and the donors agree with the county commissioners to release the county from payment of interest on their claims if it will pay the amount actually contributed, the claims of the donors are of that kind of doubtful character in equity which will raise a sufficient consideration for a compromise; and a court ought not to interfere by injunction to save the county from the payment of a demand having the sanctions of moral obligation.

BILL in chancery, filed by the county commissioners of Lucas county, to enjoin payment to defendants of county orders of said county to the amount of nine thousand twenty-nine dollars and ninety-nine cents, issued to them by the predecessors of the board of commissioners filing said bill. Trouble existed in Lucas county in regard to the location of the county seat of that county. The seat of justice of the county was authorized by law to be located at a particular place, upon condition that

citizens interested in the location would erect there, and donate to the county, a court-house and public offices. Such citizens complied with such condition; and under special legislative sanction all hands considered the seat of justice to be permanently located at the spot chosen, Maumee City. It did remain there for several years, but at the fall election of 1852 it was removed by a majority vote to the city of Toledo, by virtue of another legislative enactment, but which made no compensation to defendants in case of removal, and no restoration to defendants of the buildings erected by them, or of the lots on which they stood. The county commissioners, however, still claimed the right to use and dispose of such public buildings for other purposes than those for which they were erected and donated. The donors, after the removal to Toledo, preferred claims before the board of county commissioners for the money expended in the erection of such public buildings, with interest, on the ground of a failure of the original consideration on which the same was advanced. The county commissioners, to compromise these claims, authorized county orders to be issued to the donors for the amount of the original advancement, provided the donors would throw off the interest thereon, and release the county from all claims on account of such donations. The donors accepted the offer, executed the release, and the county orders issued. Following this there was a change in the board of county commissioners, and the new board opposed the payment of the orders, and the question was, Should the bill of the new commissioners be sustained?

Fitch and McBain, and Bassett and Kent, for the complainants.

Young and Waite, and Spink and Murray, for the defendants.

By Court, SWAN, J. There is not proof of collusion or unfairness used to obtain a compromise of the claim of the defendants upon the county. The object of the donations of the defendants to the county was to procure the county seat to be located at Maumee. It could not have entered into the contemplation of the parties that the county seat, after being once established at Maumee, would in the course of years be removed. It was, however, removed, and the county, notwithstanding, claimed the property of defendants, and the right to use and dispose of it for other purposes than those for which the defendants were induced to give it. Whatever may be the legal rights of the county under such circumstances, it is unjust and inequitable on its part to retain this property after having deprived the defend-

ants, substantially, of the consideration which induced them to give it. There was a clear moral obligation on the part of the county to either give up the property or make compensation after the county seat was removed; and respectable members of the bar and court might well have entertained doubts whether chancery would not have interfered on behalf of the defendants. Under these circumstances, we are of the opinion that the claim of the defendants was of that kind of doubtful character in equity which would raise a sufficient consideration for a compromise; and that therefore this court ought not to interpose by injunction to save the county from the payment of a demand having the sanctions of moral obligation.

COMPROMISE OF DOUBTFUL CLAIM IS SUFFICIENT CONSIDERATION for a contract: *Weed v. Terry*, 45 Am. Dec. 257; and will not be set aside, except for fraudulent misrepresentation or concealment of facts, or for such imposition as amounts to unfair and unconscientious dealing: *Mills v. Lee*, 17 Id. 118.

MORAL OBLIGATION TO DO ACT WILL SUPPORT AGREEMENT to perform it, and equity will not grant relief on the ground that the party made the agreement wrongfully, believing that he was legally obliged to perform: *Cardwell v. Strother*, 12 Am. Dec. 328. And see note to *Stafford v. Bacon*, 37 Id. 371; *State v. Reigart*, 39 Id. 628, and note thereto 639.

MILLER v. ESTILL.

[5 OHIO STATE, 508.]

PARTNERSHIP PROPERTY IS PRIMARILY LIABLE TO PAY PARTNERSHIP DEBTS; and the surplus, if any, belongs to the partners.

PARTNERS MAY ENFORCE THEIR EQUITABLE LIEN ON PARTNERSHIP PROPERTY to pay partnership debts in preference to the creditors of individual partners.

CREDITORS OF PARTNERSHIP HAVE NO LIEN ON PARTNERSHIP PROPERTY, and can invoke the rule that the partnership property shall be primarily liable only through right of partners to have joint property applied to pay joint debts.

WHEN RIGHT OF PARTNERS THEMSELVES TO APPLY PARTNERSHIP PROPERTY IN EXTINGUISHMENT of partnership debts is gone, the right of partnership creditors thus to apply is also divested.

SALE, OR ANY CONTRACT HAVING EFFECT OF SALE, BY ONE PARTNER TO HIS COPARTNERS, WILL DIVEST all further lien he may have upon the partnership effects.

WHERE ONE PARTNER TAKES PARTNERSHIP PROPERTY ON CONSIDERATION THAT HE WILL PAY the debts of the partnership, the retiring partner's lien upon the partnership effects is gone; though if the agreement be to take the partnership property and pay the partnership debts therewith, a court of equity would, perhaps, enforce a proper application of the assets of the firm in behalf of the retiring partner.

WHERE FIRM IS DISSOLVED AND ITS PROPERTY DIVIDED BETWEEN PARTNERS, the members of the firm cannot, in contemplation of insolvency, make an assignment of their property, both individual and that derived from the firm, for the benefit of and giving preference to their individual creditors, to the exclusion of their firm creditors. The statute relating to assignments in contemplation of insolvency will operate upon the assignment and work out an equal distribution.

IF PARTNER, IN CONTEMPLATION OF INSOLVENCY, DISSOLVES PARTNERSHIP BY GENERAL ASSIGNMENT of his interest and property in the firm, makes an assignment of his individual property, and authorizes the assignee to dispose of the same and pay the proceeds over to his individual creditors, the funds in the assignee's hands must be distributed *pro rata* among his own creditors and those of the firm from which he has retired.

WHERE PARTNER, IN CONTEMPLATION OF INSOLVENCY, HAS DISSOLVED PARTNERSHIP BY ASSIGNMENT TO TRUSTEE, and the partnership property is by agreement divided between the retiring partner and his associates so as to leave the property as it was before the partnership, on consideration that the remaining copartners will pay the partnership debts; and the copartners form a firm of their own, but in contemplation of their own insolvency assign all their own individual and partnership property to a trustee with directions to pay the partnership debts—the funds in the hands of the trustee of the latter firm must be distributed *pro rata* among the creditors of both the former and the latter firms; and if any balance of the funds of the latter firm remains after paying the debts of both firms, the same may be adjusted to reimburse the retiring partner, in view of the agreement that the latter firm would pay the debts of the former.

In error to the district court of Columbiana county. Travis was doing business as a merchant. Estill and Lewis Beebout were also doing business as merchants, under the firm name of Estill & Beebout. Travis and Estill & Beebout united their stocks, and formed a partnership, under the new firm name of Travis, Estill & Co. Inventories showed that Travis's capital stock amounted to about three thousand nine hundred and thirty-two dollars, and that of Estill & Beebout to three thousand six hundred and fifty dollars. Travis afterward dissolved the partnership by an assignment of his interest and property in the firm of Travis, Estill & Co. to plaintiff Miller, as trustee for the benefit of personal creditors. He also, at the same time, conveyed his individual property to the same person, for the same purpose. Miller then made an agreement with Travis, Estill, and Beebout, whereby he was to receive for Travis, from the capital stock of Travis, Estill & Co., goods of the value of those Travis had put into the partnership, and as near as practicable the same goods, and Estill and Beebout were to retain the balance of the partnership property, and pay the partnership debts. Miller, under this arrangement, received three thousand four

hundred and forty-two dollars' worth of the partnership goods. He claimed more, but Estill and Beebout alleged that that amount was larger than the amount Travis had invested in the partnership, and refused to give them. Estill and Beebout afterward did business as the firm of Estill & Beebout, but soon made an assignment to Samuel W. Beebout, one of the defendants, of their partnership and personal assets, as trustee for the benefit of the creditors of Estill & Beebout. The plaintiff Miller sought to compel a specific performance of the agreement of Estill & Beebout to pay the firm debts of Travis, Estill & Co., and for other purposes. The court appointed Samuel Small receiver, etc., and ordered him to take possession of the effects in the hands of Samuel W. Beebout, held by him under the assignment of Estill & Beebout. Miller, the plaintiff, and Beebout, the receiver, sold the stocks of goods in their hands at forced sales, and at great sacrifices, collected the debts, etc., and held the proceeds for distribution. The district court rendered final judgment, ordering Miller to distribute the funds in his hands *pro rata* among the creditors of Travis, and of Travis, Estill & Co., and also ordering the receiver to distribute the funds held by him among the creditors of the firm of Travis, Estill & Co., and those of Estill & Beebout. The claim of Travis against Estill & Beebout for the balance of the amount he alleged he had put into the capital stock of Travis, Estill & Co., and which he had claimed was not withdrawn by plaintiff in error, was disallowed, and Miller and the receiver were ordered each to pay one half the costs of the suit. To reverse this judgment was this petition in error filed.

John M. Gilman, for the plaintiff in error.

Brewer and Wisden, for the defendants in error.

By Court, SWAN, J. It is assigned for error that the court below erred in the distribution made of the funds in the hands of the plaintiff, George Miller, assignee of William B. Travis, and also in the distribution of the funds in the hands of Small, the receiver. The determination of these assignments of error involves the question whether either Travis or the creditors of the several firms had any priority over each other in the payment of debts out of the funds created by the sale of the goods.

Partnership property is primarily liable to pay partnership debts; and the surplus, if any, belongs to the partners. This primary liability arises from the equity of the partners, who have a lien upon the partnership property, which they may en-

force to pay the partnership debts, in preference to the creditors of the individual partners. The creditors of the partnership, however, have no such lien; and it is only through the right of the partners to have the joint property thus applied to pay joint debts that the creditors of the firm can invoke the application of the rule that the partnership property shall be primarily liable. When, therefore, the right of the partners themselves to apply the partnership property in extinguishment of the partnership debts is gone, the right of the partnership creditors thus to apply it is also divested. Thus it is competent for the partners, upon a voluntary dissolution, to agree that the joint property of the partnership shall belong to one of them; and if this agreement be *bona fide*, and for a valuable consideration, it will transfer the whole property to such partner, and like any other sale to third persons, will wholly free the property from the primary claim of the joint creditors. And this result will, in general, take place, although the whole or a part of the consideration of such transfer is that the partners taking the property shall pay the debts of the partnership. It seems to be a general rule that when the equities of the creditors of a partnership are to be worked out through the medium of that of the partners, it must be done upon the joint effects of the partnership.

Applying these principles to the case before us, it appears that the partnership of Travis, Estill & Co. was dissolved, and the interest of Travis in the partnership property of Travis, Estill & Co. was divested by the contract under which the plaintiff in error withdrew the interest and capital stock of Travis, in the firm, and Estill & Beebout agreed to pay the debts of the firm. The effect of this contract was a sale by Travis to Estill and Beebout, of the partnership effects, and divested Travis of all further lien upon them. In such a transaction, where one partner takes the partnership property and agrees with the outgoing partner to pay the debts of the firm, there may in some cases be circumstances which will induce a court of equity to recognize and assert a lien upon the partnership property in favor of the outgoing partner. Thus if there be a voluntary dissolution of partnership, with an agreement that one of the partners shall take the partnership property and pay the partnership debts therewith, a court of equity would, perhaps, enforce a proper application of the assets of the firm, in behalf of the retiring partner. But in the case before us, Travis first dissolved the partnership of Travis, Estill & Co. by an assign-

ment to a trustee, and then, through the trustee, divided the property of the firm, and was content with the personal promise of Estill & Beebout that they would pay the partnership debts. The object of the division seems to have been to place the parties, in respect to the partnership property, as they were before the partnership was entered into. We do not think Travis intended to retain a lien upon the partnership property which remained in the hands of Estill & Beebout, or that his equities are superior to other creditors of Estill & Beebout.

Estill & Beebout, with the goods thus held by them, commenced doing business under the name and firm of Estill & Beebout; and afterwards, under that name and firm, assigned the goods and assets of the firm, and their individual property, to Samuel W. Beebout, in trust, to pay the creditors of the firm. It seems there were no creditors of that firm.

If the assignment, however, was intended for the benefit of the creditors of the firm of Estill & Beebout, which existed prior to the formation of the firm of Travis, Estill & Co., then it was an attempt to give the creditors of the old firm a preference over the creditors of Travis, Estill & Co., and the assignment operated, under the statute, for the benefit of creditors generally.

Travis, in his assignment to Miller of his individual and firm property, undertook to give his individual creditors a preference. Whether such a preference can be given in firm property by a partner, or whether his partners could not have insisted upon his assignee applying the firm property thus assigned to the payment of the firm debts, it is not necessary in this case to inquire; for the partners of Travis, Estill and Beebout, soon after his assignment, apportioned and divided the firm property, and delivered to Miller, the assignee of Travis, the amount of the assets which Travis would have been entitled to had there been a dissolution of the partnership by mutual consent; and then Estill & Beebout agreed to pay the firm debts. This promise of Estill & Beebout to pay the firm debts did not discharge Travis from the claim of the firm creditors upon his individual property. There was, in fact, after the assignment of Travis and the apportionment and division of the assets of the firm between Estill & Beebout and Travis's assignee, no firm property or joint fund to pay the debts of Travis, Estill & Co.; so that the question really is, whether Travis and his partners could make such assignments of firm and individual property as to give individual creditors a preference over the creditors of a firm. It will be observed that a single fund only is created by these transac-

tions of Travis, and that fund is derived in part from the firm and in part from the individual property of Travis. Under these circumstances, the assignment must operate, under the statute relating to assignments, for the benefit as well of the firm creditors of Travis as his individual creditors. And in thus holding, we do not intend to determine what is the effect of an assignment by a partner of his individual property only for the benefit of his individual creditors. But we do hold that where a firm is dissolved, and the property of the firm divided between partners, the members of the firm cannot, in contemplation of insolvency, make an assignment of their property, both individual and that which was derived from the firm, for the benefit of and giving preference to their individual creditors, to the exclusion of their firm creditors. The statute relating to assignments in contemplation of insolvency will operate upon the assignment, and work out an equal distribution.

The agreement of Estill & Beebout with Travis, through Miller, his assignee, to pay the partnership debts of Travis, Estill & Co., cannot be interposed to disturb the distribution of the assets in the hands of the receiver and of Miller, to creditors. The creditors must be first paid; and, when paid, the balance of the funds, if any, may be adjusted in view of this agreement of Estill & Beebout with Travis. There not being, however, sufficient funds to pay the debts, the creditors of Travis, Estill & Co. receive a *pro rata* amount upon the whole of their claims; and the amount of those claims remaining unpaid, after the application of the fund derived from the assets of Estill & Beebout, will be a proper subject of adjustment under the above-mentioned agreement of Estill & Beebout with Travis, to pay the debts of Travis, Estill & Co.; but Travis cannot, under that agreement, place himself in the relation of a creditor of Estill & Beebout, so as to claim any portion of that fund. If Travis could thus, as creditor under that agreement, claim a portion of that fund, a distribution would in effect be obtained twice upon the same debts, and Travis's portion of the fund on account of his liability to the creditors of Travis, Estill & Co. be transferred and applied to the payment of the creditors of Travis, Estill & Co.

The decree of the court below was in accordance with these views, and must be affirmed.

The order of distribution seems to have been made generally to creditors, and was not, as the assignment of errors assumes, confined to creditors named in the report.

Whether the court erred in disallowing the claim of Travis, against Travis, Estill & Co., we cannot determine, as the record does not disclose the facts upon which the court passed.

The order directing the assignee and receiver each to pay one half the costs, was not, so far as we can perceive, an abuse of discretion in the court below. We cannot, therefore, disturb it.

Decree of the district court affirmed.

RIGHT OF PARTNER TO HAVE EFFECTS OF FIRM APPROPRIATED TO PAYMENT OF FIRM DEBTS: *Pearson v. Keedy*, 43 Am. Dec. 160; *Ladd v. Griswold*, 46 Id. 443; *Buchan v. Sumner*, 47 Id. 305.

PARTNER'S RIGHT TO FINAL BALANCE AFTER PAYMENT OF FIRM DEBTS: *Pearson v. Keedy*, 43 Am. Dec. 160; *Buchan v. Sumner*, 47 Id. 305; *Cummings's Appeal*, 64 Id. 693.

PARTNER'S LIEN ON PARTNERSHIP PROPERTY: *Pearson v. Keedy*, 43 Am. Dec. 160, and note 164; *Buchan v. Sumner*, 47 Id. 305, and note 320; *Bardwell v. Perry*, Id. 687, and notes 694; *Kirby v. Schoonmaker*, 49 Id. 160; *Rice v. Barnard*, 50 Id. 54; *Allen v. Center Valley Co.*, 54 Id. 333; *Allen v. Hawley*, 63 Id. 198.

CREDITOR'S LIEN ON PARTNERSHIP PROPERTY: *Ketchum v. Durkee*, 45 Am. Dec. 412, and notes 415; *Bardwell v. Perry*, 47 Id. 687, and notes 694; *Allen v. Center Valley Co.*, 54 Id. 333, and note 338. The creditors have no lien on the partnership property, and must work out their preference through the medium of the partners whose interests remain undisposed of: *Baker's Appeal*, 59 Id. 752; their lien is derived from one of the partners who has a lien upon the partnership property for the payment of the partnership debts; and such lien by a partner, being derivative, ceases when he has divested himself of his interest. If the means by which he has divested himself of this interest is fraudulent, the creditors may be relieved in a court of chancery: *Wilson v. Soper*, 56 Id. 573.

ON RESPECTIVE RIGHTS OF PARTNERSHIP AND INDIVIDUAL CREDITORS, see *Allen v. Wells*, 33 Am. Dec. 757; *Ladd v. Griswold*, 46 Id. 443, and reference in note 447; *Buchan v. Sumner*, 47 Id. 305, and numerous citations in note to same 319; *Kirby v. Schoonmaker*, 49 Id. 160, and note 163, containing numerous cases; *Bardwell v. Perry*, 47 Id. 687, and note 694; *Rice v. Barnard*, 50 Id. 54; *Emanuel v. Bird*, 54 Id. 203; note to *Allen v. Center Valley Co.*, Id. 338.

CREDITORS OF SOLVENT PARTNERSHIP in the event of one partner selling all its assets to the other have no prior right to satisfaction out of such assets over the creditors of the partner to whom such sale was made: *Ketchum v. Durkee*, 45 Am. Dec. 412.

PARTNER'S ENGAGEMENT TO PAY PARTNERSHIP DEBTS IS BUT PERSONAL CONTRACT, and creates no lien where it is entered into by him on a sale to him of his partner's interest; and such partner need not appropriate the partnership assets to the payment of partnership liabilities: *Baker's Appeal*, 59 Am. Dec. 752; note to *Ketchum v. Durkee*, 45 Id. 415.

EFFECT OF SALE OR TRANSFER OF PARTNER'S INTEREST UPON HIS EQUITABLE LIEN of having partnership assets applied to the payment of firm debts: See note to *Ketchum v. Durkee*, 45 Am. Dec. 415; *Ladd v. Griswold*, 46 Id. 443; *Smith v. Edwards*, Id. 71; *Allen v. Center Valley Co.*, 54 Id. 333; *Howe*

v. *Lawrence*, 57 Id. 68, and note 73; *Baker's Appeal*, 59 Id. 752, and note 758. Transfer of partnership property in satisfaction of a private debt of one of the firm after the failure of the partnership is fraudulent and void as to the partnership creditors: *Yale v. Yale*, 33 Id. 393.

ON DISSOLUTION OF PARTNERSHIP, ASSIGNMENT BY RETIRING PARTNER, *bona fide*, of all his interest in the stock and effects of the remaining partners, vests the same in the latter as his individual property, and it will be distributable accordingly, notwithstanding his subsequent insolvency; and this rule applies as well to limited as to general partnerships: *Upson v. Arnold*, 63 Id. 302. Instance of valid assignment: *Kirby v. Schoonmaker*, 49 Id. 160. Instance of void assignment: *Goddard v. Hapgood*, 60 Id. 272.

CREDITORS' RIGHTS AGAINST INCOMING PARTNER AGREEING TO PAY DEBTS OF OLD FIRM: See note to *Baker's Appeal*, 59 Id. 758.

MAD RIVER & LAKE ERIE R. R. CO. v. BARBER.

[5 OHIO STATE, 541.]

RAILROAD COMPANY'S LIABILITY FOR INJURY TO ONE NEITHER PASSENGER NOR EMPLOYEE is governed by that pervading principle of social duty founded on the common law, that every person must so conduct his own affairs as not to injure the rights of another, expressed in the legal maxim, *Sic utere tuo ut alienum non lædas*. In such cases there is no relation arising out of any privity of contract.

AS BETWEEN RAILROAD COMPANY AND PASSENGER, DUTY OF SAFE CONVEYANCE IS MEASURED by a severe rule arising out of the nature of the obligation, and a principle of public policy; and passengers undertake to run those risks only which cannot be avoided by the utmost degree of care and skill on the part of the carrier in the preparation and management of the means of conveyance.

CONDUCTOR OR OTHER EMPLOYEE OF RAILROAD COMPANY UNDERTAKES HIS ENGAGEMENT in contemplation of the ordinary hazards of the business, and upon the incidental condition, not that the company will insure him against accidental injuries, but will exercise reasonable and ordinary care and diligence in the discharge of its duties in regard to the business.

RAILROAD COMPANY PLACING ONE PERSON IN ITS EMPLOY UNDER DIRECTION OF ANOTHER IN ITS EMPLOY IS LIABLE FOR INJURIES to the person placed in the subordinate situation, by the negligence of his superior, upon the ground that the injured person, at the time of the injury, was acting under the immediate control and direction of his superior, by whose neglect the injury was received; and thus occupied a position which precluded him from exercising his own discretion in looking to and providing for his own safety.

RAILROAD COMPANY IS NOT LIABLE TO CONDUCTOR OR OTHER EMPLOYEE FOR INJURY resulting from the carelessness, negligence, or misconduct of another employee, when both are engaged in a common service, and no power or control is exercised by the one over the other.

RAILROAD COMPANY IS PRESUMED TO USE REASONABLE AND ORDINARY CARE AND DILIGENCE IN HIRING SERVANTS, in keeping its road in repair, and in providing it with sufficient and suitable cars and machinery for its

use. Neglect of any such duty will render it liable in damages to one of its conductors or other employees injured on account of such neglect.

WHERE RAILROAD COMPANY ITSELF IS IN FAULT AS TO ITS OWN PECULIAR DUTIES, and by means of its neglect of that reasonable and ordinary care which it must be presumed to exercise in regard to its own business an injury is occasioned to one of its conductors or other employees, the company is liable in damages, unless the servant was also in fault, and his negligence or misconduct contributed as a proximate cause to the injury.

CONDUCTOR OR OTHER EMPLOYEE OF RAILROAD COMPANY WAIVES HIS OWN RIGHTS, AND TAKES RISK UPON HIMSELF, if, with the full knowledge of the neglect and omission of said company to employ a sufficient number of hands to manage and safely run a train, to employ suitable and competent persons, to keep its road in proper repair, to provide it with sufficient, safe, and sound machinery, or to otherwise perform its own peculiar duties, he continues on in the business of the company, without any correction of such omission or neglect.

RAILROAD COMPANY IS NOT LIABLE TO ACTION FOR DAMAGES FOR INJURY RECEIVED BY CONDUCTOR of one of its trains, in consequence of the insufficiency of the cars, or defects in the machinery, or running apparatus of the train under his charge and control, where such insufficiency or defects were unknown to both parties, and neither party was in fault.

WHERE CONDUCTOR IS SOLE REPRESENTATIVE OF RAILROAD COMPANY SO FAR AS HIS TRAIN IS CONCERNED, it is his duty, as the conductor of such train, to use ordinary and reasonable skill and diligence on his part, not simply in the management of the train, but also in supervising the due inspection of the cars, machinery, and apparatus, as to their sufficiency and safety, while under his charge; and on the discovery of any defect or insufficiency, to notify the company, and to take the proper precautions to guard against danger therefrom.

PLAINTIFF SEEKING TO RECOVER DAMAGES FROM RAILROAD COMPANY FOR INJURY RECEIVED BY HIM WHILE ACTING AS CONDUCTOR OF ONE OF ITS TRAINS, and caused by the company's failure and neglect to provide the train with sufficient hands, and suitable and safe machinery, etc., must lay a sufficient foundation for a recovery and judgment, in addition to the allegation that he had not a knowledge of the insufficiency or defects which were the alleged cause of the injury, that he had exercised due care and diligence in the use and examination or inspection of the cars, machinery, etc., belonging to the train, while the same were in his charge and under his direction.

WHAT CONSTITUTES NEGLIGENCE IN REGARD TO DUTY ENJOINED BY ANY PARTICULAR RELATION OR EMPLOYMENT is usually, if not invariably, a mixed question of law and of fact; but what duty the law implies as incident to any particular relation or employment is always a question of law for the determination of the court.

THIS was a petition in error to reverse the judgment of the district court of Seneca county. The nature of this judgment is stated in the opinion. It appears that the plaintiff below was the conductor of one of defendant's freight trains of cars

running between the city of Sandusky and Kenton, Ohio, on the track of defendant's road. Defendant had two freight trains on that route, running on alternate days between the two places mentioned. Benjamin R. Pratt was the conductor of the other train, and they were accustomed to pass each other at Tiffin. On December 27, 1852, the plaintiff and Pratt, with the consent of J. A. Barker, the general freight agent of defendant, exchanged trains for one trip. On the next day the plaintiff, with Pratt's train, met Pratt, with plaintiff's train, about a mile north of Tiffin, and they exchanged back again, and plaintiff took his own train, and proceeded south with it on his way to Kenton. The plaintiff's train was, when he took it, behind time, and he was further and unavoidably delayed at and near Tiffin. Plaintiff had on said train no freight for any station between Tiffin and Kenton, and after leaving Tiffin he did not stop at any station, except once or twice to take wood and water for the engine, until he arrived at Kenton. Plaintiff made no examination of the cars composing said train, for the purpose of ascertaining the condition of the brakes and machinery therewith connected, or of the wheels and running-gear, either at the time he took the same from the hands of Pratt, or at any time after that on that day. At Kenton the cars, heavily loaded with lumber, separated on account of a defective link connecting the third and fourth cars, and plaintiff endeavored to turn the brake to stop the cars which were moving down on a steep grade. The brake gave way, and he was thrown in front of a car, which passed over his right arm and crushed it badly, and caused the injury for which he claimed forty thousand dollars damages. When plaintiff took the train from Pratt there were only three persons on board besides himself, viz., the engineer, fireman, and wood-passer. Defendant gave evidence to prove that plaintiff, as the conductor of said train, had the entire management and control of the same while on the road, etc.; that it was his own fault if there were no brakemen on said train; that the train was a distributing freight train; that there were five regular stations on said road between Tiffin and Kenton; that it was the duty of plaintiff, as the conductor of said train, to stop with the same at each station, and at each station to examine the wheels, running-gear, brakes, and machinery connected therewith, of the cars comprising said train; that if any car became unsafe to run, it was the conductor's duty to leave it at the first side-track; and that it was his duty to report all defects and deficiencies to the freight agent, etc. Defendant requested the court to give the jury the following instructions:

1. That so far as the plaintiff was concerned, the defendant was not bound to furnish cars with brakes of any particular construction; and that the fact, if such be the fact, that the brake-staff on the car from which the plaintiff fell was surmounted by a cross-bar instead of a wheel, furnished no grounds of recovery in this case, even though the jury should find the latter mode of construction to be the safest and best; 2. That if the jury find that the plaintiff had been running his train for one or more trips without brakemen or trainmen, and without complaint on his part, the fact that there were no such men on the train at the time of the accident furnishes no ground for recovery; 3. That if the jury find that the absence of brakemen on the train in plaintiff's charge at the time of the accident was by reason of the negligence of Pratt, who by plaintiff's consent had conducted said train from Sandusky to Tiffin, when it was taken by the plaintiff, then such absence of brakemen gives to the plaintiff no right to recover; 4. That if the jury find that the injuries of which the plaintiff complains were occasioned by defects in the machinery or cars composing the train under the plaintiff's charge, and that such defects were unknown to the defendant, and were of such a character that the defendant could not, in the exercise of ordinary care, have detected or avoided them, that for injuries thus occasioned the plaintiff cannot recover; 5. That the plaintiff in entering into the employ of the defendant as the conductor of any of its freight trains took upon himself the ordinary hazard of that business, and that the breaking of a brake-chain or connecting-link from secret or latent defects therein, which could not by ordinary care have been discovered, is one of the ordinary hazards of that business, and for injuries sustained by the plaintiff occasioned by such breaking, the plaintiff is not entitled to recover; 6. That if the injuries of which the plaintiff complains befell him by reason of his ignorance of defects in the machinery or cars composing the train of which he had charge—which defects he might have known by the exercise of proper care and caution, and the performance of his duty as conductor of said train—then he is not entitled to recover; 7. That if the plaintiff's neglect of duty, as the conductor of the train in the petition mentioned, contributed in any degree to produce the injuries of which he complains, he cannot recover. The material part of the court's instructions which were given to the jury, and which were noticed particularly by the appellate court, will be found quoted in the opinion. The court, in further instructions to the jury, either refused or qualified

the instructions asked by the defendant's counsel, thus: "That as to the instruction first requested by the defendant as aforesaid, the court would not give the same in the form requested, but would give it with this modification: that though the defendant was not bound to provide brakes of any particular construction, yet that it was bound to furnish good brakes of a safe kind, provided brakes were at all necessary (which was a question depending on the evidence). And that it was not a question between the kind of brakes; but were brakes necessary to the safe conduct of the train? and if so, were those furnished such as reasonable skill, diligence, and care would have furnished as safe brakes? That as to the instruction secondly requested by the defendant as aforesaid, the court refused to give the same, and said to the jury that such was not the law in Ohio, unless by the express or implied terms of his contract it was a part of his duty to determine the number, care, and skillfulness of the trainmen and brakemen, or to employ or provide them; if such were his duty, and he failed to perform it, it furnished no ground of recovery; otherwise if this duty devolved on other employees of the company, not under control of plaintiff. That as to the instruction thirdly requested by the defendant as aforesaid, the court refused to give the same in manner and form as requested, but instructed the jury that if the plaintiff and Pratt had exchanged trains without the consent of the defendant, then the defendant was not liable for Pratt's negligence; but if said exchange was made with the defendant's consent, or under its direction, then Pratt was simply the agent of the company for the delivery of the train to Barber on the road, when they might meet, and in that case defendant was liable for the negligence of Pratt, exactly in the same manner, and to the same extent, it would have been liable for the negligence of any other agent, whose duty defendant had made it to deliver to plaintiff a reasonably safe train and machinery. That as to the instruction fourthly requested by the defendant as aforesaid, the court refused to give the same in its terms, but said to the jury that the defendant would not be liable for such defects as it could not, by the exercise of reasonable care, have detected, and what was reasonable care in this case had been already explained. That as to the instruction fifthly requested by the defendant as aforesaid, the court refused to give it in its terms, but said to the jury that as to the care which the defendant was bound to exercise, it must be reasonable, and what was reasonable care under the circumstances had already been ex-

plained to them; that what was reasonable, as before stated to them, depended on the nature and hazard of the enterprise or business in which they were engaged. That as to the instruction sixthly requested by defendant as aforesaid, the court refused to give the same in its terms, but instructed the jury that it was right, provided it was the plaintiff's duty to examine for and detect these defects, and whether it was his duty thus to do was a question of fact for the jury to determine, as also whether it was or was not a part of his duty, or was the duty of other employees over whom plaintiff had no control. That as to the instructions seventhly by the defendant requested as aforesaid, the court refused to give the same in its terms, but said to the jury that if the plaintiff's neglect of his duty caused the injury, or was such as that without it the injury would not have happened to him, then the plaintiff could not recover. But though he might have been guilty of negligence, yet if the accident was unavoidable by reason of defendant's fault or omission, and must have happened though plaintiff had done his entire duty, in such case plaintiff would have a right to recover, and that whenever the plaintiff's right to recover was spoken of in this charge, it was under the limitations and instructions in the charge as an entirety." Defendant excepted to the charge as given by the court to the jury, and to the refusal to instruct and charge as requested. Barber got a verdict for nine thousand five hundred dollars. Motion for new trial overruled, and judgment entered on the verdict. Plaintiff in error made an assignment of errors: 1. That the petition of the plaintiff below did not state facts sufficient to constitute a cause of action; or rather that from said petition itself it appeared that the plaintiff below was not entitled to recover; 2. That the court below erred in its charge to the jury, and erred in refusing to charge as requested by the defendant below. The other facts stated in the opinion will make it clear.

W. F. Stone and N. H. Swayne, for the plaintiff in error.

C. K. Watson and J. C. Lee, for the defendant in error.

By Court, BARTLEY, C. J. The judgment sought to be reversed was recovered in the district court by Barber, the defendant in error, for an injury received by him while employed and acting as the conductor of a train of freight-cars on the railroad of the plaintiff in error. The alleged ground of the company's liability was: 1. Failure and neglect to provide the train with the necessary number of hands to manage and control the same;

and 2. Failure and neglect to furnish the train with necessary, suitable, and safe machinery for running and managing the same; and for negligently and wrongfully furnishing the train with defective and unsafe machinery, and cars with platforms unsuitable and unsafe to stand on in working the said machinery.

The main and leading questions presented in this case, therefore, arise out of the duties and obligations created by the relation between Barber, as the conductor of a train of cars, and the company as his employer. This relation, both as to its nature and its legal incidents, differs somewhat from that of a subordinate hand on the train, and the company; it also differs from that of a passenger on a train of cars, and the company; and it also differs from that of a person receiving an injury on a railroad, who is neither a passenger nor an employee. As between the company and a person who is neither a passenger nor an employee, there is no relation arising out of any privity of contract; consequently any liability of the former for an injury to the latter can be determined only by that pervading principle of social duty founded on the common law, that every person must so conduct his own affairs as not to injure the rights of another, expressed in the legal maxim, *Sic utere tuo ut alienum non lædas*:

As between a passenger and the railroad company, the duty of safe conveyance is measured by a severe rule, arising out of the nature of the obligation and a principle of public policy. Those who ordinarily intrust themselves in traveling to the agents and vehicles of railroad companies have but limited means of information as to either the competency or fidelity of the agents, or the sufficiency of the cars and machinery; and passengers undertake to run those risks only which cannot be avoided by the utmost degree of care and skill on the part of the carrier, in the preparation and management of the means of conveyance. Such is the doctrine both of the English and the American courts: *Hegeman v. Western Railroad Corporation*, 13 N. Y. 9 [64 Am. Dec. 517]; Story on Bailm., secs. 601, 602; 2 Greenl. Ev., sec. 222.

The nature of the relation between the company and its agents and employees being essentially different from that between the company and passengers, the duties and obligations arising out of it are different, and consequently give rise to a different rule of liability. The company can act only through its agents and employees, who are engaged in a common enterprise, in which they share the responsibility, and in which

the safety of each depends much on the efficiency with which every other performs his duty. They have opportunities of observing the conduct of each other, and requiring fidelity by reporting delinquencies; and they have means of information as to the sufficiency of the machinery, and the condition of the road, as well as opportunities of adopting precautions for safety not ordinarily open to passengers. And they make their engagements to serve the company in view of the natural and ordinary hazards incident to the business, and must be presumed to stipulate for a proportionate compensation.

It was adjudged in the case of *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415, that when an employer places one person in his employ, under the direction of another also in his employ, such employer is liable for injuries to person placed in the subordinate situation, by the negligence of his superior. And this doctrine was reviewed and affirmed by this court in the case of the *Cincinnati etc. R. R. Co. v. Keary*, 3 Ohio St. 201, upon the ground that the injured agent or employee, at the time of the injury, was acting under the immediate control and direction of his superior, by whose neglect the injury was received; and thus occupied a position which precluded him, for the time being, from exercising his own discretion in looking to and providing for his own safety.

The principle settled in these cases, however, is distinguishable from that which governs in the case before us. Here Barber, at the time of the injury, was not under the direction or control of any superior officer or agent of the company. He had the control and charge of the train himself, as its conductor. True, the train and the road were the property of the company. But the charge and use of the train were committed to Barber, who was at the time, so far as that train was concerned, the sole representative of the company. This superintending charge gave him power to regulate the speed of the train, to run it or to stop it, and to control and direct it in any emergency according to the dictates of his own judgment. True, he was to use and manage the train in accordance with the rules and regulations prescribed by the company; but in doing so, he was not under the directing authority of any superior or superintending agent of the company. The responsibility of his position imposed upon him the duty of reasonable care and diligence, not only in the management of the train, but also in the due inspection of the cars, machinery, and apparatus committed to his charge; and in case of any insufficiency in the number of the

hands, or delinquency in the performance of duty by the hands on the train, or in case of any defect in the cars or machinery, to report the same to the company, and forthwith take the necessary and proper precautions for the safety of the train, and the persons upon it.

Under these circumstances, what risks did Barber assume to run, and what duties and obligations rested upon the company? The business was hazardous, and he undertook the employment, and made his engagement in contemplation of the perils incident to it. The company did not insure him against accident, or those unforeseen perils which due and proper care and diligence could not provide against. Injuries from accidents, which the utmost stretch of human skill and foresight cannot provide against, are incident to all situations and conditions in life. And because one person is in the employ of another in a hazardous business, it does not follow that the employer must stand responsible for damages resulting from injuries received through accidents which a proper degree of diligence and skill cannot guard against.

The company was presumed to use reasonable and ordinary care and diligence in the selection and employment of competent and suitable agents and employees, in keeping its road in repair, and in providing it with sufficient and suitable cars and machinery for its use. And in Barber's undertaking to act as the conductor of this train of freight-cars, he may be presumed to have stipulated in contemplation of the performance of this reasonable and ordinary duty on the part of the company, and to have undertaken to have incurred all the risks and hazards of the business on that condition. The company, therefore, became responsible to him only in case of an injury received by him through a neglect of that reasonable and ordinary care and diligence in the performance of its duty which it was presumed to exercise, and in contemplation of which its employees make their engagements. And this neglect, in order to create a liability on the part of the company, must be the wrongful act of the company, as distinguished from the neglect of a mere operative or agent of the company. For, however as to passengers, or persons who are neither passengers, agents, nor employees, a railroad company may be responsible for injuries done by the neglect or misconduct of its agents or employees while engaged in the business of the company, it appears to be settled both in England and in this country, that the company is not liable to an operative or agent in its employ for injuries resulting from

the carelessness of another operative or agent, when both are engaged in a common service and no power of control is exercised by the one over the other: *Cincinnati etc. R. R. Co. v. Keary*, 3 Ohio St. 201; Redfield on Railways, 386. And this doctrine, that the company is not liable to one employee for injuries received from another in the same business or service, it is said, tends to make all employees anxious, watchful, and interested for the fidelity of each other, and it is one of the risks in view of which every employee enters the service of the company. But this doctrine, that the principal is not liable to one agent or servant for an injury arising from the neglect or misconduct of other agents or servants, must be received with this qualification, that the principal is without fault in the selection and employment of the other agents and servants, or in continuing them in their places after they have been shown to be incompetent or unsuitable persons. Of the cases in which it has been held that a principal is not liable to one agent or servant for an injury caused by the wrongful act of another agent or servant engaged in the same business, it was said by the court of appeals in New York, in the case of *Keegan v. Western R. R. Co.*, 8 N. Y. 180 [59 Am. Dec. 476], that "they are applicable only where the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it did happen. Whenever the injury results from the actual negligence or misfeasance of the principal, he is liable as well in the case of one of his employees or agents as in any other."

It appears that a principal is liable in damages for an injury sustained by his agent or employee while in his service, only where the injury is the result of an omission of that reasonable and ordinary care on the part of the principal himself, in the discharge of his duty, which persons of ordinary prudence are presumed to exercise in that particular pursuit. Where, therefore, an agent or employee of a railroad company has been injured by means of the neglect of ordinary diligence and care on the part of the company, either in not employing a sufficient number of hands to manage and safely run a train, or in employing, or continuing in the employment of the company, incompetent and unsuitable persons, or in not keeping the road in proper repair, or in providing the road with insufficient, defective, and unsafe machinery and cars—in either case, the company is liable. But the company would not be liable, even in any

such case, providing the agent or employee was himself guilty of neglect or misconduct at the time, which contributed to the injury; or providing the agent or employee, with a full knowledge of such omission of duty or neglect on the part of the company, waived the matter by continuing in the service of the company without taking the precaution, or using his exertions, to have the omission or difficulty remedied. For if the agent or employee of the company waive the omission of duty on the part of the company, he takes the risk upon himself, and if damaged, he must abide by the maxim, *Volenti non fit injuria*.

A careful examination of the duties and obligations incident to the relation of employer and employee, touching the questions in the case before us, leads to the following conclusions:

1. That the agent or employee of a railroad company undertakes his engagement in contemplation of the ordinary hazards of the business, and upon the incidental condition, not that the company will insure him against accidental injuries, but will exercise reasonable and ordinary care and diligence in the discharge of its duties in regard to the business.

2. That the company is not liable to one agent or servant for an injury resulting from the negligence or misconduct of another agent or servant while engaged in a common business with him, but without any superior authority or control over him.

3. But where the company itself is in fault as to its own peculiar duties, and by means of its neglect of that reasonable and ordinary care which it must be presumed to exercise in regard to its own business, an injury is occasioned to an agent or employee, the company is liable in damages, unless the agent was also in fault, and his negligence or misconduct contributed as a proximate cause to the injury.

4. If, however, the agent, with a full knowledge of the omission and neglect of ordinary care on the part of the company, continues on in the business of the company, without any correction of such omission or neglect, he thereby waives his own rights and takes the risk on himself.

The application of these conclusions to the case before us removes all difficulty in the determination of the main questions presented.

The first ground of neglect charged upon the company is the failure to furnish the train with a sufficient number of hands. It appears from the testimony of the engineer that there was neither a brakeman nor a trainman on the train on the day of the accident; that the train never had a brakeman; and that for

about four days, or two trips, it had been without a trainman; and he further testifies that there ought to have been one trainman and two brakemen on the train. In the absence of either a brakeman or a trainman, the conductor had, of course, to perform, to some extent, the duties of both; and he was in the act of performing the duty of one of these subordinate hands when he received the injury complained of.

It appears, therefore, that the company was guilty of a neglect of due and reasonable care in the failure to supply the train with a sufficient number of hands for its safe and proper management. But in the charge and control of the train Barber was the directing agent, and sole representative of the company. It was his duty to notify the company of the want of sufficient hands, and to require the company to furnish them. It is not averred in the petition, nor does it appear in the proof, that the company had a knowledge that this train was running without a sufficient number of hands, or that the conductor had either given the company notice of the insufficiency of hands on the train, or required them to be supplied. So far, therefore, as the deficiency in the number of hands upon the train contributed to the injury, the maxim, *Volenti non fit injuria*, applies. It is an old and settled rule of the common law that no one can maintain an action for a wrong where he has consented or contributed to the act which has occasioned it.

The other ground upon which the recovery was sought below was the alleged failure and neglect of the company to furnish sufficient and safe machinery and cars; and the alleged wrongful and negligent act of the company in actually furnishing the train with defective, unsafe, and insufficient cars and machinery.

It appears that there was a defect in the link which connected the third and fourth car of the train back of the engine, on account of its not having been sufficiently welded in the making, by means of which a separation in the train took place. It appears, further, that the brake on the first car of the detached portion of the train was in a bad condition for want of connection between the brake-blocks; that the brake-chain was defective, and broke when Barber was attempting to use it to stop the detached portion of the train on a down grade. The top of the brake-staff was a cross-bar, and the platform for a person to stand on to work the brake was claimed to be insufficient and unsafe. By means of these defects in the cars and machinery, the accident occurred by which the defendant in error received the injury.

The duty imposed on the company by the relation occupied by the conductor was to use reasonable and ordinary care and diligence in furnishing him with sufficient, sound, and safe cars and machinery for the train. This duty required not only that the company should use proper skill and diligence in procuring and furnishing sufficient and safe cars and machinery, but also, when notified that they had become insufficient and unsafe, or when they had been in use as long as they could with safety be used, to take them off the road until repaired and made sufficient and safe. And for any injury sustained by an agent or employee of the company from any neglect of this duty the company would be liable. But the relation occupied by the agent or employee imposes a reciprocal duty upon him. It was the duty of Barber, as the conductor of this train, to use ordinary and reasonable skill and diligence on his part, not simply in the management of the train, but also in supervising the due inspection of the cars, machinery, and apparatus, as to their sufficiency and safety, while under his charge; and on the discovery of any defect or insufficiency, to notify the company, and to take the proper precautions to guard against danger therefrom. And if he was injured by the negligence of the company in furnishing, or continuing to use, defective cars and machinery, yet if his own neglect of duty in the management of the train, or due inspection of the cars and machinery in his charge, contributed as a proximate cause of the injury, he could have no right of action against the company for damages; or if he knew of the defects and insufficiency of the cars or machinery, and without taking the necessary and proper precaution to guard against danger, continued to use them, he took upon himself the risk, and waived his right as against the company. If there was no neglect of due and ordinary care and diligence on the part of the company furnishing or continuing the use of the cars and machinery, and the injury was caused by latent defects, unknown alike to the company and to the conductor, and not discoverable by due and ordinary skill and diligence in the inspection of the cars and machinery, it would be a misadventure falling among the casualties incident to the business, and for which no one could be blamed. But if the defects which caused the injury were actually unknown either to the company or the conductor, and not discoverable by due and ordinary inspection, and yet were such as resulted from a neglect of reasonable and ordinary care and diligence on the part of the company, either in procuring the cars or machinery to be

made, or in continuing their use on the road beyond the time when they could be safely used, the company would be liable in damages for the injury. And whether such was the case or not, was a matter of fact for submission, under proper instructions, to the jury in the court below.

The view of the law here expressed as applicable to this case, and in which we all concur, is at variance with the instructions given by the court below to the jury in various particulars.

The charge of the district court to the jury, taken in its whole context, together with the instructions asked by counsel, and refused or qualified by the court, gave an erroneous view of the law which governs this case.

The court instructed the jury as to the rule of liability applicable to the company, without the proper qualification where the fault of the conductor contributes as a proximate cause to the injury, or where the conductor, with a knowledge of omissions and neglect on the part of the company, waives its obligations and takes the risk upon himself.

And the court instructed the jury as to the company's liability as follows: "She undertook to furnish said train and machinery in good and safe condition; she undertook to devote reasonable care, attention, and diligence to the machinery and other material that made up the train; and this either by the plaintiff or some other person. She undertook to furnish the train with such number of hands, possessing reasonable skill, as were necessary to the safe conduct of the train. She agreed, in short, that everything necessary for the conduct of the train with safety to the conductor should be done on her part. And finally, she undertook to be responsible to Barber for the negligence or carelessness of certain of her employees, through whose negligence or carelessness an injury might result to him. And in the discharge of these undertakings, she was to use reasonable and proper care, diligence, and skill." And in this connection the court charged that "that care, skill, and diligence, in order to be reasonable when a party puts in motion a most dangerous body, must be of the highest order." And the court continued in these words: "Now, inquire of the evidence whether the railroad company has performed these undertakings. If she has performed these and all other undertakings on her part, if she has been guilty of neither carelessness, negligence, or want of skill, she is not liable."

Now, the court in thus charging did not state the duty and obligations of the company with accuracy; did not distinguish

between general acts of neglect on the part of the company, and negligence contributing either as a remote or a proximate cause to the injury; but by direct implication gave the impression that if the company had neglected any of its undertakings, either those mentioned or others, or been guilty of any act of negligence or want of skill, whether the same was connected with or contributed as a proximate cause to the injury or not, the company was liable to this action. The charge in this respect was calculated, at least, to mislead the jury.

The court gave the instruction that the company "undertook to be responsible to Barber for the negligence and carelessness of certain of her employees, through whose negligence or carelessness an injury might result to him," as a rule of law applicable to this case, without further qualification or explanation. As Barber was not acting under the immediate direction or control of any superior officer or agent of the company at the time, this instruction, as applied to this case, was directly at variance with the doctrine of the case of the *Cincinnati etc. R. R. Co. v. Keary*, 3 Ohio St. 201.

The court also erred in instructing the jury that what constituted "the various duties of a conductor of a train of cars," incident to his position, was a question of fact to be found by the jury from the evidence. Now what constitutes negligence in regard to a duty enjoined by any particular relation or employment is usually, if not invariably, a mixed question of law and of fact; but what duty the law implies as incident to any particular relation or employment is always a question of law for the determination of the court.

It is also assigned for error that the petition does not set forth sufficient legal grounds to constitute a cause of action.

It is essential that the plaintiff, in order to lay a sufficient foundation for a recovery and judgment for an injury received by him while acting as the conductor of a train of cars, should aver or show in his petition, in addition to the allegation that he had no knowledge of the insufficiency or defects which were the alleged cause of the injury, that he had exercised due care and diligence in the use, and also in the examination and inspection, of the cars and machinery belonging to the train while the same was under his charge and direction. The petition contains no such averment, and on this ground is fatally defective.

Other questions are made in this case, but it is not deemed necessary to express the views of the court upon them.

Judgment of the district court reversed and cause remanded.

EVERY PERSON MUST SO USE HIS OWN PROPERTY AS NOT TO INJURE THAT OF HIS NEIGHBOR: *Kerchacker v. Cleveland etc. R. R. Co.*, 62 Am. Dec. 246.

PERSONS TO WHOM MANAGEMENT OF RAILROAD IS ENTRUSTED MUST EXERCISE the strictest vigilance: *Pennsylvania R. R. Co. v. Aspell*, 62 Am. Dec. 323; and company's liability for negligence should be strictly enforced on grounds of public policy: *Cumberland V. R. R. Co. v. Hughes*, 51 Id. 513.

RAILROAD COMPANY'S LIABILITY TO PASSENGERS: *Gillenwater v. M. & I. R. R. Co.*, 61 Am. Dec. 101; *Galena etc. R. R. Co. v. Fay*, 63 Id. 323, and notes 333; *Hegeman v. Western R. R. Corp.*, 64 Id. 517, and exhaustive note to same 521, on liability of carriers of passengers for injuries resulting from defects in their vehicles and other appliances: *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 327; *Zemp v. W. & M. R. R. Co.*, 64 Id. 763.

LIABILITY OF MASTER TO SERVANT FOR INJURIES RESULTING FROM NEGLIGENCE OF FELLOW-SERVANT: See *Gillenwater v. M. & I. R. R. Co.*, 61 Am. Dec. 101, and note thereto 108, discussing the subject.

RAILROAD COMPANY'S LIABILITY FOR INJURIES TO TRESPASSERS: See note to *Little Schuylkill N. R. & C. Co. v. Norton*, 64 Am. Dec. 674.

FOR DOCTRINES OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE as applied to the liability of railroad companies, see note to *Ware v. B. & L. Canal Co.*, 35 Am. Dec. 197; *Chicago & M. R. R. Co. v. Patchin*, 61 Id. 65; *Murch v. Concord R. R. Corp.*, Id. 631, and notes 641; *Kerchacker v. Cleveland etc. R. R. Co.*, 62 Id. 246, and copious references in notes thereto 270; *Pennsylvania R. R. Co. v. Aspell*, Id. 323, and voluminous notes to same 327; *Nelson v. V. & C. R. R. Co.*, Id. 614; *Galena & C. U. R. R. Co. v. Fay*, 63 Id. 323, and notes 333; *Little Schuylkill etc. Co. v. Norton*, 64 Id. 672, and note 675; *Zemp v. Wilmington etc. R. R. Co.*, Id. 763, and notes 771; *Cumberland V. R. R. Co. v. Hughes*, 51 Id. 513.

NEGLECTANCE IS MIXED QUESTION OF LAW AND FACT: the judge is to instruct as to what is negligence, and the jury, in most cases, ascertain whether the facts sustain the definition: *Zemp v. Wilmington etc. R. R. Co.*, 64 Am. Dec. 763, and note 771.

THE PRINCIPAL CASE WAS CITED in *Whaalan v. Mad River & L. E. R. R. Co.*, 8 Ohio St. 253, to the point that the servant takes upon himself all the ordinary risks of the business, including the liability to injury from the negligence of other servants employed with him, by the common principal, but having no control over the business, or the servant who receives the injury. It was summarized in *Columbus etc. and Little M. R. R. Cos. v. Webb's Adm'rs*, 12 Id. 487, as illustrating the questions in the latter case. In *Lake Shore & M. S. Railway Co. v. Knittel*, 33 Id. 468, it was cited in the discussion of a railroad's dangerous way of doing business. "If it be conceded," said the court, "that the switching of cars from the main track to a side-track of the road, while the train is in motion, is a dangerous mode of doing the business, and ought to be regarded as evidence of negligence of the company or its officers; still, as all the employees entered the service of the company with full knowledge that such was the practice, or acquired such knowledge afterward, and remained in the service without the least objection thereto, and fully acquiesced therein, they must be regarded as having consented to the practice or as having waived any objection thereto, and therefore as having taken the risk upon themselves."

THURSTON v. LUDWIG

[6 OHIO STATE, 1.]

VERBAL AGREEMENT, TO HAVE EFFECT OF ALTERING TERMS OF PRIOR WRITTEN CONTRACT, must be supported by a new and valid consideration, or must have been so far acted upon that a refusal to carry it out would work a fraud on one of the parties.

ASSUMPSIT, in which the plaintiffs declared upon the following written contract: "This is to certify that William Ludwig agrees to deliver to Thurston & Hays from three hundred to five hundred good merchantable stock hogs, none to weigh less than seventy pounds, to be delivered in Delaware, Ohio, from first to fifth of March next, for which Thurston & Hays agree to give three dollars and ten cents per hundred gross weight on delivery. Wm. Ludwig, Thurston & Hays. Bucyrus, January 13, 1852." The other facts are stated in the opinion.

Peleg Bunker and James R. Hubbell, for the plaintiffs.

Stephen R. Harris, for the defendant.

By Court, BARTLEY, C. J. The single question presented by this case is, whether the written contract of the parties was altered by a verbal agreement. The written contract expressly provided for payment for the hogs by the plaintiffs, at the time of delivery, which was to be between the first and the fifth of March succeeding the time of the making of the contract on the thirteenth of January, 1852. It appears that immediately after the execution of the written contract, the defendant, Ludwig, insisted that, according to a custom among stock dealers, he ought to have some money in advance; and the plaintiff Thurston at first declined, but finally promised the defendant that he would make him an advance of one hundred and fifty or two hundred dollars about the first of February. The district court regarded this verbal promise as a valid alteration of the written contract between the parties, and as creating a condition precedent to the obligation of the defendant to deliver the hogs. Was there error in the action of the court in this regard?

It is well settled, as a general rule, that all parol negotiations between the parties to a written contract anterior to or contemporaneous with the execution of the instrument, are to be regarded as either merged in it or concluded by it. Accordingly it is held that parol evidence is incompetent to show terms or conditions at variance with or in addition to a written agreement which the parties agreed to verbally, prior to or at the

time the contract was reduced to writing, but which were not inserted in the instrument: *Powell v. Edmunds*, 12 East, 6; *Ridgway v. Bowman*, 7 Cush. 268; *Small v. Quincy*, 4 Me. 497; Ch. Cont. 110. And it appears to be equally well settled that, subsequent to the execution of a written contract, it is competent for the parties, by a new contract, although not in writing, either to abandon, waive, or annul the prior contract, or vary or qualify the terms of it in any manner. And where the verbal contract only changes or modifies some of the terms of the original contract, it embraces by reference all the written stipulations of the original undertaking, and is to be proved by the verbal agreement taken in its connection with the written contract. But where a written contract is thus either totally abandoned and annulled, or simply altered or modified in some of its terms, it is done, and can only be done, by a distinct and substantive contract between the parties, founded on some valid consideration. And among the multifarious verbal negotiations of parties in reference to their mutual stipulations in written contracts, to draw the line of distinction between those which are valid and effectual as alterations or modifications of the terms of written contracts, and those which are mere policitations, or *nuda pacta*, and therefore of no binding validity, requires, sometimes, much nicety of discrimination. And it is to be regretted that the reported adjudications bearing upon this distinction are not all entirely perspicuous and consistent. The general language employed by some of the elementary authors touching this subject, to the effect that the parties to a written contract may, by parol agreement, waive, abandon, or discharge a written contract, in whole or in part, or alter or modify any of its terms, has led some to the inconsiderate conclusion that it could be done without any new and valid consideration. This, however, is a mistake. A valid consideration is an essential and indispensable element in every binding agreement. If a written contract be altered by verbal agreement, such agreement must have the essential ingredients of a binding contract; and although it may have reference to, and indeed embody, the terms of the written contract, yet it must be founded on a new and distinct consideration of itself.

When the verbal agreement of parties amounts to a waiver or discharge of mutual stipulations in a written contract, either in whole or in part, the discharge of each by the other from the obligations of the contract may furnish a sufficient consideration. Forbearance, or extrinsic considerations, may exist to

furnish sufficient legal foundation for an alteration, by verbal agreement, of the stipulations in a prior existing contract. An agreement by one person to discharge another from the obligations of a written contract, as a matter purely *ex gratia* and in the nature of a donation, would be of no binding validity as a mere executory agreement, and to be effectual must be fully executed by an actual release or surrender of the contract, in writing. There is a class of cases, however, where a written contract may be altered or modified by a mere verbal agreement of the parties, which at its inception, or as a mere executory agreement, would have no binding effect, yet by being acted upon by the parties until it would work a fraud or injury to refuse to carry it out, becomes binding and effectual as a contract. But a verbal agreement, to have the effect to alter or modify the terms of a prior written contract, must be a valid and binding contract of itself, resting upon some new and distinct consideration. And it cannot be supported on the supposition that it is founded on the continuation or extension of the consideration of the prior or written contract, which was complete of itself, and, so far as it went, fixed the rights of the parties.

In the case of *Goss v. Nugent*, 5 Barn. & Adol. 65, in which the doctrine that a written contract may be annulled, or its terms altered, by subsequent verbal contract, is laid down by Lord Denman in the broadest language, it is not pretended that it can be done otherwise than by a "new contract," which, of course, must be founded on a new and distinct consideration.

The case of *Lattimore v. Harsen*, 14 Johns. 350, was a case in which the plaintiffs, in a suit to enforce a verbal contract, had subjected themselves to a penalty for the non-fulfillment of a written contract; and finding the contract a hard one, chose to pay the penalty rather than perform the contract, and thereupon the other party, preferring the fulfillment of the contract to the payment of the penalty, verbally agreed that if the plaintiffs would go on and perform the work they should be paid therefor whatever it was reasonably worth, with which the plaintiffs complied. Here was a new and distinct contract, and founded upon a new and distinct consideration. The performance of the work under the first contract was abandoned, and being more beneficial to the defendant even than the penalty incurred, furnished a good consideration for the new contract. And the court place the decision strictly on the ground of a sufficient new consideration. Substantially to the

same effect is the case of *Munroe v. Perkins*, 9 Pick. 298 [20 Am. Dec. 475], where one, by an instrument under seal, agreed to erect a building for a fixed price, which proved to be an inadequate compensation, and having performed part of the work, refused to proceed further; whereupon the obligee promised that if the party would go on and complete the work he should be paid for his labor and materials what they were reasonably worth, and the work was done. Here the employer had a right of action on the written contract which was broken; but he chose, in view of the benefit of the work, to make a new contract for its performance.

And the case of *Cummings v. Arnold*, 3 Met. 486 [37 Am. Dec. 155], stands upon the same principle; also the case of *Dearborn v. Cross*, 7 Cow. 48; *Randolph v. Perry*, 2 Port. 376 [27 Am. Dec. 659]; *Perrine v. Cheesman*, 12 N. J. L. 177 [19 Am. Dec. 388].

There is a class of cases where parol evidence has been admitted in connection with written evidence, where it is apparent from the writing itself that it does not embody the whole contract of the parties, or where the verbal agreement is not inconsistent with, but supplementary to, the written agreement. The case of *Jeffery v. Wallon*, 1 Stark. 267, falls within this class, where in the hire of a horse a written stipulation on a card existed, merely regulating the time of hiring and the rate of payment; parol evidence was admitted showing additional terms in the agreement. Also *Wallace v. Rogers*, 2 N. H. 506, where articles were sold accompanied by a bill of parcels fixing the quantity, price, etc. *Hogins v. Plympton*, 11 Pick. 99, and *Bradford v. Manly*, 13 Mass. 139 [7 Am. Dec. 122], are to the same effect. To this class also belongs the case of *White v. Parkin*, 12 East, 578. The principle of these cases must be distinguished from that which is applicable to the case before us.

There is a still more extensive class of cases in which parol evidence has been admitted to vary the terms of a prior written contract, where the verbal agreement, as a mere executory contract, would, at its inception, be wholly ineffectual, but which acquires validity and becomes binding from having been executed or acted on by the parties. Under the rule in this class of cases, oral evidence is admissible to show that by a subsequent agreement the time for the performance has been enlarged, or the place for the performance changed from that fixed by the written contract: 1 Greenl. Ev., sec. 304; *Keating v. Price*, 1 Johns. Cas. 22 [1 Am. Dec. 92].

But an oral agreement to enlarge the time or change the place of performance fixed by a written contract must be subsequent to the time of the execution of the latter, and constitute an independent agreement of itself, acquiring its binding effect either from an existing consideration at the time, or from having been acted upon by the parties until it could not be disregarded by one party without working an injury to the other party. In the case of *Lefevre v. Lefevre*, 4 Serg. & R. 241 [8 Am. Dec. 696], it was held that parol evidence was admissible to prove that after the execution of a deed conveying a right to a watercourse through the granted land by courses and distances, a verbal agreement was entered into between the parties, for their mutual accommodation, altering the route of the watercourse. And this evidence was admitted expressly on the ground that the parties had acted on the verbal agreement, so that the original contract could no longer be enforced without a fraud upon one party. To the same effect is *Crosman v. Fuller*, 17 Pick. 174; also *Richardson v. Cooper*, 25 Me. 450; *Bailey v. Johnson*, 9 Cow. 115; *Lynch v. McBeth*, 7 How. Pr. 113.

Upon a full review of the whole subject, it appears to be well established that a verbal agreement, to be effectual and binding as an alteration of the express terms of a prior written contract between the parties, must be supported by a new and valid consideration. And that a mere executory contract, of the kind to constitute an exception to this rule, must have been acted upon so far that a refusal to carry it out would work a fraud on one of the parties.

The application of this view of the law to the case before us removes all difficulty in making a satisfactory disposition of it. The verbal promise of Thurston was manifestly unsupported by any valid consideration, as disclosed by the evidence. The parties had just settled the terms of their written contract, completed the execution of it by which Ludwig had bound himself to deliver the hogs in consideration of the undertaking of Thurston & Hays to pay the stipulated price, at the time of delivery in March. The time and place of payment were fixed by the express terms of the written contract. The custom of the country, if any such actually existed as that spoken of by Ludwig, could not have affected the express terms of the written contract. What conceivable consideration can be assigned to support Thurston's promise as a binding obligation? Ludwig had not refused a compliance with the written contract which he had just executed. Why should

Thurston, except as a mere matter of accommodation, or favor, resting in his own discretion, promise an advance of one hundred and fifty or two hundred dollars to Ludwig, one month before the stipulated time of payment, and that, too, without security, when the terms of his written contract secured him against any such a risk? As a consideration for this promise, Ludwig was not required to deliver any more hogs; nor of a better quality, nor at any other time or place, nor at a less price, nor wait any greater length of time for the balance of the money. In short, Thurston was to take nothing for the fruits of his promise, to which he was not entitled, and which he had not a right to expect at the time, from the performance of the written contract by Ludwig. The proposed advance, therefore, so far as the evidence discloses it, was a naked promise of an accommodation or favor, resting in the option of Thurston; and it appears to have been so treated by the parties at the time. The written contract which had just been signed was before them when the promise of the advance was made. If intended as a stipulation in their contract, why was it not inserted or indorsed on the contract at the time? Why did Ludwig take his duplicate copy of the contract, at the very time of the promised advance, and separate from Thurston without a change in the writing, which he carried away with him as the evidence of the agreement? And it is not made to appear that Ludwig ever made any request of Thurston for the advance. On the contrary, when Thurston, about the first of February, and near the time when the promised advance was to have been made, sent his son to Ludwig to inquire about the delivery of the hogs, instead of requesting the advance he did not even inquire about it, but said that he had the hogs, or the most of them, and would be ready to deliver them at the time specified. If the solemn stipulations of a written contract could be altered by a mere naked verbal promise under such circumstances, that certainty, which is the greatest guaranty of safety among business men, arising out of written contracts, would be greatly weakened. And evidence of loose and inconsiderate conversations, often not fully understood or accurately remembered, would be resorted to in many cases to show wavers or variations in the stipulations of parties, with a view of avoiding the binding obligations of written contracts.

We are unanimous in the opinion that there was error in the proceedings of the district court.

Judgment reversed and cause remanded.

SWAN, BRINKERHOFF, BOWEN, and SCOTT, JJ., concurred.

WRITTEN CONTRACT MAY BE ALTERED BY SUBSEQUENT VERBAL AGREEMENT, where the alteration is made on a good consideration and before any breach of the contract: See *Cummings v. Arnold*, 37 Am. Dec. 155, note 161, where other cases are collected; *Peck v. Beckwith*, 10 Ohio St. 500; *Negley v. Jeffers*, 28 Id. 101, both citing the principal case. The parties to a contract may change its terms by the assent of both parties, and if such alteration is acted upon by one of them, it will be binding upon the other: *Mehurin v. Stone*, 37 Id. 58, citing the principal case. But in order to alter the terms of a written contract by a verbal agreement subsequently made, there must be a new consideration for such agreement, or it must be so far executed or acted upon that a refusal to carry it out would operate as a fraud: *Rawson v. Taylor*, 30 Id. 400, citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in support of these propositions in the following cases: No parol understanding had before or at the time of the delivery of a note is admissible to contradict its legal effect: *Jones v. Brown*, 11 Ohio St. 606; all parol negotiations between the parties to a written contract, anterior to or contemporaneous with its execution, are regarded as merged in it or concluded by it: *Howard v. Thomas*, 12 Id. 204; oral testimony is not admissible to vary or control a written contract: *Neil v. Trustees*, 31 Id. 20.

LEAVITT v. MORROW.

[6 OHIO STATE, 71.]

ACCORD AND SATISFACTION COMING FROM STRANGER having no pecuniary interest in the subject-matter is, if accepted, in discharge of the debt, a perfect defense to a subsequent action against the debtor.

ASSUMPSIT by Morrow against Leavitt & Lee as executors of Hans Wilson. Among the defenses was one to the effect that after the death of Hans Wilson, his widow, Jane Wilson, who was also a devisee and legatee under his will, at the request of Morrow, the plaintiff, and as an accord and satisfaction of plaintiff's claim here sued upon, procured a conveyance of certain lands to be made by William Kelly and wife to one McFarland, as trustee, for the use of Morrow and his wife; and that Morrow accepted such conveyance as a full satisfaction of his claim. On the trial, the jury was instructed that plaintiff could recover, unless Jane Wilson had a pecuniary interest to make the settlement of the claim against her husband's estate; that in the absence of such interest she would be a mere stranger, and that satisfaction by a stranger would be no bar to plaintiff's recovery. Verdict for plaintiff. Motion made for new trial and overruled. Defendants sued out a writ of error.

Stanton and McCook, for the plaintiffs in error.

Miller and Sherrard, for the defendant.

By Court, BARTLEY, C. J. The main question presented for determination in this case is, whether an accord and satisfaction, accepted in discharge of a debt, but coming from a stranger, or person having no pecuniary interest in the subject-matter, is a legal defense to an action against the debtor, or his legal representatives. The charge of the district court to the jury was in the negative of this proposition; and if the court erred in this, the judgment must be reversed.

It requires powers of discrimination looking far beyond the justice of the case to see the reason of the rule that accord and satisfaction, although moving from a stranger, yet accepted by the creditor, and set up in the plea of the defendant as a discharge of the debt, does not constitute a legal defense to the action. It is said in some of the early adjudications touching this subject that the reason of the rule is, that the person from whom the accord and satisfaction comes is not privy to the contract giving rise to the debt. This reason might give just cause to the creditor to refuse to receive the satisfaction from a stranger, or third person, not known in the transaction of the parties, even as agent of the debtor. But where the creditor has actually received and accepted the contribution in satisfaction of the debt, to allow him to maintain an action on the same debt afterward would seem to shock the ordinary sense of justice of every man. It is urged, in support of the rule, that one man cannot make another his debtor without his consent; that one man cannot make a gift or donation to another, unless the latter consent to receive it; and that it may be possible that a debtor may, on account of cross-claims, matters of set-off, or in view of other circumstances, be unwilling that a stranger should step in, and, by voluntary contribution, satisfy the claim of his creditor. All this may be very true and not affect the controversy in this case. And it is said that exceptions may exist to all general rules—indeed, that exceptions sometimes prove the rule. It may be laid down as incontestable, as a general thing, that where one man is indebted to another, and a third person steps in and pays the debt, in the absence of all circumstances tending to show the contrary, the rational inference would be, that the act done, being for the debtor's benefit, was done with his consent, or if without his knowledge at the time, that it would, as a matter of course, be ratified by him afterward. If in such a case the creditor should subsequently bring suit against the debtor, and the debtor should appear in the action and plead the satisfaction in discharge of his liability, I cannot conceive

upon what just and rational ground the creditor could be allowed to reply that his debt was not discharged, because the satisfaction which he had accepted in discharge of it was without the consent of the defendant. The very fact of the satisfaction being set up in the action by the defendant in discharge of the debt would of itself seem sufficient to conclude the plaintiff from denying that it had received the defendant's consent or ratification.

It is claimed, however, on behalf of the defendant in error, that the question in this case depends upon a rule of law which was decided many years ago, and which has been recognized and acquiesced in by the sages of the law for nearly two hundred years; that the common law settles the question, which has been fined and refined by an infinite number of grave and learned men, through a succession of ages, until, by long experience it has grown to such perfection that, in the language of Lord Coke, "no man of his own private reason ought to be wiser than the law." It is true that the doctrine that an accord and satisfaction, moving from one who was a stranger, and in no sort privy to the condition of the obligation, could not be pleaded in bar by the obligor, which was reported by Croke to have been laid down in *Grymes v. Blyfield*, Cro. Eliz. 541, and which appears to have been affirmed in *Edgcombe v. Rodd*, 5 East, 294, and recognized as law in some of the other English decisions, as well as in some of the elementary books and abridgments, has been followed in a number of the reported cases in this country. In the case of *Clow v. Borst*, 6 Johns. 38, and the case of *Stark's Adm'rs v. Thompson's Ex'rs*, 3 T. B. Mon. 303, the rule appears to have been adhered to; and in the case of *Daniels v. Hallenback*, 19 Wend. 410, it was recognized with some qualification.

But mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason, and tend to the purposes of justice. The maxim, *Communis error facit jus*, has a limited application. Otherwise, it could never be said that law is the perfection of reason, and that it is the reason and justice of the law which give to it its vitality. When we consider the thousands of cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application, we can appreciate the remark of Chancellor Kent in his Commentaries, vol. 1, p. 477, that "even a series of decisions are not

always evidence of what the law is." Precedents are to be regarded as the great storehouse of experience, not always to be followed, but to be looked to as beacon-lights in the progress of judicial investigation, which, although at times they may be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps in the road to truth.

The doctrine that satisfaction is no defense if it accrue from a stranger appears to have taken its origin from the case of *Grymes v. Blofield*, Cro. Eliz. 541, above mentioned, and which, according to Croke, was decided by two judges only, *cæteris justiciariis absentibus*. And although the case purports to be reported from the rolls, yet the report is manifestly inaccurate; for it is reported as having been decided on demurrer to the plea, "at Trinity term, 36 Elizabeth;" and "afterwards in Easter term, 31 Elizabeth," was finally adjudged for the plaintiff; so that, according to the report, the final adjudication of the case was five years before the decision of the question on the demurrer to the plea. And it is not a little remarkable that this same case is reported by Rolle in his Abridgment as having been decided exactly the other way, and in favor of the defendant, and referred to as a decision at Trinity term, 39 Eliz.: 1 Roll. Abr. 471, tit. Condition, F. It is also worthy of remark that the decisions of the English courts touching this question have not been entirely consistent with Croke's report of this case. In the case of *Hawkshaw v. Rawlings*, 1 Stra. 23, it was held that "although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is." And in the case of *Thurman v. Wild*, 39 Eng. Com. L. 148, Lord Denman, C. J., strongly questions the authority, not only of the case of *Grymes v. Blofield*, *supra*, but also the case of *Edgcombe v. Rodd*, 5 East, 294; and in reference to the former says: "But the reporter, in a note, observes truly that in Rolle's abridgment of the same case the judgment is stated exactly the other way—to have been for the defendant, and that the plea was good. This circumstance," adds Chief Justice Denman, "and some inaccuracies which are manifest in Croke's report, certainly detract from the authority of the case in East [*Edgcombe v. Rodd*], as to this point, which depends on the report in question," of *Grymes v. Blofield*, *supra*.

Some doubt is thrown over the subject in New York, by the remarks of the judge in delivering the opinion of the court in the case of *Daniels v. Hallenback*, 19 Wend. 410. Although the decision in the case of *Clow v. Borst*, 6 Johns. 38, is cited and recognized, yet Mr. Justice Bronson adds: "The best and most

secure form of pleading such a defense is by way of satisfaction. The very point of the plea is that the plaintiff accepted the thing in satisfaction. Had it been alleged that the plaintiff accepted and received the stones in satisfaction, it may be that the jury, on proof of the facts stated in the pleas, would have been warranted in finding the issue in favor of the defendants." These remarks of the judge, although their consistency with other parts of the opinion is not very manifest, fully sustain the plaintiff in error in the defense which he attempted to set up in the district court in the case before us.

The supreme court of Alabama, in the case of *Webster v. Wyser*, 1 Stew. 184, held that an accord and satisfaction, coming from a third person, and accepted by the plaintiff in discharge of the defendant's liability, is a bar to an action.

Mr. Chitty, in his valuable treatise on the law of contracts, says that the correctness of the doctrine that an accord and satisfaction by a stranger is not a good bar has been doubted; and that "the better opinion would appear to be that satisfaction made by a stranger to a third party having a cause of action, and adopted by the party liable to the action, is a good bar to an action for such cause:" Ch. Cont. 779. The same doctrine is laid down in *Parsons on Contracts*, a still more modern elementary work: See *Parsons on Cont.* 200.

From an examination of the whole subject, it appears that the case of *Grymes v. Blofield*, *supra*, as reported by Croke, in which the doctrine originated that a plea of accord and satisfaction, moving from a stranger, was not a good plea in bar, is, to say the least of it, of doubtful authority; and in the cases in which it has been followed, both in England and this country, it appears to have been adopted with little or no inquiry into the reason or justice of its application. The rule laid down is purely technical; and the reason assigned, that the stranger is not privy to the condition of the obligation, loses all its reality when we consider that the satisfaction must have been accepted by the plaintiff, and assented to or ratified by the defendant. It would seem, therefore, that a rule which in its tendency is calculated to foster bad faith and defeat the purposes of justice ought not to be adhered to simply on account of its antiquity.

We are unanimous in the opinion that there was error in the instructions of the district court to the jury.

Judgment reversed, and cause remanded for further proceedings.

SWAN, BRINKERHOFF, BOWEN, and SCOTT, JJ., concurred.

THE PRINCIPAL CASE IS APPROVED IN *Harvey v. Tama County*, 53 Iowa, 233. It is cited in *Wellington v. Kelly*, 84 N. Y. 547, as a case which with others has criticised and materially limited *Grymes v. Blofeld*, Cro. Eliz. 541; it is also miscited in *Neely v. Jones*, 16 W. Va. 636.

CINCINNATI INSURANCE CO. v. DUFFIELD.

[6 OHIO STATE, 200.]

LEGAL EFFECT OF ABANDONMENT, IN SENSE IN WHICH IT IS USED IN POLICIES of marine insurance and in the law regulating that subject, is to operate as a transfer to the underwriter of the property insured, but only to the extent of the indemnity contemplated by the policy.

IN CASE OF ABANDONMENT, PROCEEDS OF WRECK INURE TO BENEFIT OF PARTIES BEARING LOSS: to the underwriters in proportion to the parts by them severally insured, and to the owner in proportion to the part remaining uninsured.

LEGAL EFFECT OF ABANDONMENT IS NOT CHANGED BY INSERTING THIS CLAUSE in a policy of marine insurance: "In all cases of abandonment, the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat, and every part thereof, free from all claims and charges whatever." This clause was merely intended to prescribe the form in which the transfer should be made to the underwriters of the interest which they derive by law from the abandonment, and to point out the mode in which the intention to abandon should be unequivocally expressed. But it cannot have the effect of discharging the insurers from their legal liability to account to the assured for his proportion of the proceeds of the wreck after abandonment.

ERROR to the superior court of Cincinnati at general term. The steamboat Sam Cloon, valued at twenty thousand dollars, was insured in four insurance companies, in each office to the amount of three thousand seven hundred and fifty dollars, or fifteen thousand dollars in all. The policies were all in the same form. The steamboat sank in the Mississippi river, and was abandoned to the insurance companies. The companies had her raised, and realized from her sale, after deducting expenses, the sum of three thousand dollars. The owners brought this action to recover one fourth of this sum. The superior court, at special term, rendered judgment for the insured, and this judgment was affirmed at the general term. The petition in error was brought in this court to reverse this judgment of affirmance. The other facts appear from the opinion.

Coffin and Mitchell, for the plaintiff in error.

John S. Nixon, for the defendants in error.

By Court, SCOTT, J. In order to have a clear apprehension and correct solution of the question made in this case, it is necessary to understand what is meant by an abandonment; what are its legal effects, and what would be the legal rights of the parties, independent of the provisions of the policy on the subject of abandonment.

The term "abandonment," as used in policies of marine insurance and in the law regulating that subject, is a technical one.

"An abandonment is an act on the part of the assured by which he relinquishes and transfers to the underwriters his insurable interest, as far as it is a subject of the policy, or the proceeds of it, or the claims arising from it:" 2 Phill. Ins. 382. "The abandonment cannot transfer the interest of the assured any further than that interest is covered by the policy:" Arnould on Ins. 1159.

"The abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy:" *Patapsco Ins. Co. v. Southgate*, 5 Pet. 622.

Such we understand to be the well-settled legal effect of an abandonment. It operates as a transfer to the underwriter of the property insured only to the extent of the indemnity contemplated by the policy; and this limitation of its operation is not only sanctioned by the authority of the elementary writers and the general current of decisions, but has its foundation in equity and sound principle.

Upon what principle of equity should the underwriter, in case of abandonment, take the wreck not only of that which he has insured, and of which his contract binds him to pay the full agreed value, but also of that which he has not insured, and for which he is in no event liable to pay?

It would seem equitable, and in ordinary cases of insurance such is doubtless the law, that where an abandonment may be and is legally made, the wreck or its proceeds inure to the benefit of those who bear the burden of the loss: to the underwriters in proportion to the parts by them severally insured, and to the owner in proportion to the part remaining uninsured, and as to which he is virtually his own insurer. The ground upon which the insurer takes the wreck is, that he pays the party assured for a total loss, and to the extent to which his contract binds him thus to pay, to the same extent, and no further, is he entitled to the proceeds of the wreck. His rights originate from his obligations, and cannot be more than co-extensive.

But did the parties intend, by the clause in the policy out of which this controversy arises, materially to change the legal rights of the insurer and the assured growing out of an incident to an abandonment?

That clause is in these terms: "In all cases of abandonment the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat and every part thereof, free of all claims and charges whatever."

The right of the party assured to "abandon" in a proper case seems here to be contemplated, and strictly recognized, and yet if we adopt the construction claimed by the plaintiff in error, the policy does not permit the making of a legal, technical abandonment, under any circumstances, but substitutes therefor a transfer, having an effect which the law does not attach to an abandonment.

That the "claims and charges" mentioned in this clause were understood by the parties to refer, not to the interest of the party insured in the boat, but to mortgages or other liens held by other parties against the boat, is satisfactorily shown by the terms of the guaranty taken by the plaintiff in error from the defendants on the payment of the sum insured.

The construction claimed would, in cases of partial insurance, often prevent an abandonment where the settled rules of law would authorize it, or would defeat that indemnity, which is the very ground and object of all legitimate insurance.

A construction leading to such results, so vitally changing the legal rights of the parties, and working apparent injustice, ought not to be adopted unless required by clear and explicit language.

We think a different construction may be fairly given to the clause in question—that it was not intended to change the legal effect of an abandonment, which the framer of the policy may be presumed to have understood; but to prescribe the form in which the transfer should be made to the underwriters of the interest which they derive by law from the abandonment; and to point out the mode in which the intention to abandon should be unequivocally expressed.

The elementary writers tell us that "no particular form of abandonment is prescribed, and the form is said not to be material. It has not been considered requisite, as a general rule, that an abandonment should be made in writing: " 2 Phill. Ins. 447.

In *Chesapeake Insurance Co. v. Stark*, 6 Cranch, 272, Marshall, C. J., giving the opinion of the court, said: "The informality of

the deed of cession is thought unimportant, because if the abandonment was unexceptionable the property vested immediately in the underwriters, and the deed was not essential to the rights of either party."

As no deed of cession, transfer, writing, or particular form is essential to an abandonment, doubts have sometimes arisen as to what will constitute a valid abandonment. To prevent all difficulty or misunderstanding on this point we may reasonably suppose was the object in requiring that the abandonment should be accompanied and evidenced by a formal assignment and transfer of the property insured. And the clause may have also been intended to provide that the abandonment should be general, embracing the whole subject-matter of the insurance.

Besides, we understand an abandonment to operate as a transfer to the underwriter of the legal title to and right of disposal of what remains of the thing insured, and the formal assignment provided for in the clause under consideration may reasonably have been intended simply to facilitate the sale of the wreck by the insurance companies without discharging them from their legal liability to account to the party assured for his proportion of the proceeds. Such discharge can only be effected by language so clear and explicit as to leave no reasonable ground for misapprehension on the part of the insured.

Judgment affirmed.

BARTLEY, C. J., and SWAN, BRINKERHOFF, and BOWEN, JJ., concurred.

ABANDONMENT, WHEN PROPERLY MADE, TRANSFERS TITLE OF WRECK to the underwriters: *Evans v. Ingersol*, 15 Ohio St. 294, citing the principal case. The master, upon a valid abandonment, becomes the agent of the insurers: *Mowry v. Charleston I. & T. Co.*, 60 Am. Dec. 122.

EAGLE v. BUCHER.

[6 OHIO STATE, 295.]

WHERE SEVERAL PERSONS FORM ASSOCIATION TO CARRY ON MINING ADVENTURE in California, the association furnishing outfit and money for eight of its members who are to labor in the mines, and upon their return, within a certain time, to account to the association for the amount of their gains, which are to be divided among the members in a manner agreed upon, the eight members so selected to go to the mines stand in the relation of employees to the association; and if, on their arrival in California, they refuse to work together, and partition among themselves the property given to them by the association, this will not release them

from their obligations to the association, nor will it work a dissolution of the association. It will release the eight members from further liability to one another; but the association may compel any one of them to account to it for his earnings while working separately, the amount found due to it to be distributed to the holders of its stock *pro rata*, but excluding from such distribution all of the eight who refuse to account to the association.

BILL in chancery. The "association" referred to in the opinion was called the "Mohicansville Mining Association," and was formed by the complainants and the defendant in January, 1849. The facts necessary to an understanding of the case are sufficiently stated in the opinion.

John P. Jeffries and P. B. Wilcox, for the complainants.

Levi Cox, for the defendant.

By Court, BOWEN, J. The parties interested in this cause properly denominated themselves an "association." Their organization was completed by the adoption of a constitution, to which they all subscribed. The object of thus uniting together is fully defined. It was limited to one purpose—a mining adventure—to be conducted upon terms set forth and agreed upon. In the fruits of that adventure all were to participate, according to what were deemed equitable rules. To carry on the enterprise, capital was necessary to be raised and expended, and labor must be performed in a region two thousand miles or more distant from the locality of the associated body. These two points were, therefore, primarily considered and decided upon. From the members of the association, eight were to be chosen to perform the journey to the mines, and after reaching there to employ their skill and industry in procuring the golden treasure for themselves and companions in the enterprise. Within a given period they were to return and place into the treasury of the parent institution the productions of their labor, for distribution among its several members. When they separated from the association to go to their remote place of employment, they took with them, in teams, implements for mining, provisions, and money, all of its resources. These they were to retain, as well as one half of their net gains, but were to divide the other half with their fellow-associates. They must be regarded as employees, as hired men, laboring by contract for the association, whose delegates and servants they were. They might properly co-operate together, might choose a captain and other officers from their own members to direct their affairs on

the way and during their continuance abroad. This they attempted to do; and while we are free to concede that they had full power, as detached and separate members of the association, required by the nature of their undertaking, to act without its presence and advice, to regulate, by rules of their own, the duties to be observed by themselves; yet they could not, by such private regulations, dissolve the association, nor release themselves from their contract to labor and account for their earnings, or to answer in damages for a breach of it. The determination which they formed and acted upon after reaching California—of appropriating the property of the association among themselves individually, and of working separately, in disregard of their obligations to the association—was a most inexcusable and immoral violation of their written and valid obligations to their principals. That act can only be characterized as one of marked dishonesty and bad faith. As between the eight, it was a relinquishment of each to the others of all claim to their joint earnings. Each accepted the proposal to work alone, and share separately the benefits of his individual labor, without any recourse upon the others; but as to the association into whose service they had entered, and whose interests they had undertaken to promote, they could not, by this *ex parte* and wrongful movement, relieve themselves from liability. Whether they wrought jointly or separately, whether their earnings were large or small, they were nevertheless responsible to the association, and could be required to account to it for whatever they made during the time they were thus employed.

The principle relied on by defendant's counsel, that a partnership may be dissolved by the act of one of the partners, we do not, in the view we take of this case, intend to impugn. That is too well settled to be now questioned. But to effect that purpose, the act must be done with a view to its accomplishment. It should be communicated at once to the other members of the firm. They must be advised of the new relations created by the withdrawal of a member, or a transfer of his interest in the concern. Their future relations toward each other, and their pursuit of the particular enterprise, depend on the acquisition of such knowledge.

Now, whether the eight men intended anything more than the dissolution of their own organization, and liberty to each to work when and where it best suited him, does not seem to be very clear. Some of them said they would never pay anything

to the association. But they did not, certainly, by any expression or act signify that they intended to dissolve the original association. Their acts do not indicate that to have been their object. They were willing, doubtless, to free themselves from working together, and from reporting any account of their gains. But as we have before shown, while they might accomplish these ends as between themselves, they could not, standing as they did in the places of hired men, far removed from the observation of, and without the means of communicating with, their co-members at home—bound by their agreements to serve as such, and to give statements of their labor within the time agreed on—disconnect and discharge themselves from the association.

If the defendant was fortunate in his visit to and labors in the mines—if his hopes were more than realized by his good luck in procuring gold in large amounts—he ought to have borne in mind that the aid of the Mohicansville association rendered to him had mainly contributed to his good fortune; that in reality he owed it to the organization of that body and the employment of the means it gave him to engage in the enterprise; and that however others had fared who had gone on the same errand with himself, or however faithless they may have been to their employers, it was his duty, in the true spirit of the agreement, to share with his patrons the fruits of his toil and good management. This he declined to do, and it is in this proceeding sought to coerce him to perform that which he has, against equity and conscience, refrained from doing, and we think the appropriate relief should be granted.

The exceptions to the master's report must be sustained, and an account taken as to the amount of money earned by the defendant. One half of the sum found to be in his hands he will be allowed to retain. The other half must be distributed to the holders of the stock of the association *pro rata*, but excluding all of the eight who went to California, except the defendant and Philip Wertsbauger. The stock subscribed by them to share in the distribution with the others.

Decree accordingly.

BARTLEY, C. J., and SWAN and SCOTT, JJ., concurred.

BRINKERHOFF, J., having formerly been of counsel in this case, did not sit on the hearing of it.

ROXBOROUGH v. MESSICK.

[6 OHIO STATE, 448.]

WHERE DEBTOR VOLUNTARILY TRANSFERS NEGOTIABLE INSTRUMENT TO SECURE DEBT PREVIOUSLY INCURRED by him without any agreement for security, and the parties are left, after such transfer, *in statu quo* as to the debt, no new consideration, stipulation for delay, or credit being given, or right parted with by the creditor, such instrument is not received by the creditor in the usual course of trade, for value, but is taken subject to all the equities existing against it at the time of the transfer.

ERROR to the superior court of Cincinnati in general term. The action was brought by Messick & Co. against Roxborough, the maker, and Wilcox, the indorser, of a promissory note. It was proved on the trial that Roxborough made the note sued on and gave it to Wilcox, his former partner, as part payment for the latter's interest in a grocery store. The note was transferred to Messick & Co. to secure a large sum of money due to them from Wilcox. They received the notes in good faith, without any knowledge on their part that Roxborough had any equity that he could assert against their payment. The testimony of Messick repelled any presumption that Messick & Co., in receiving the notes from Wilcox, incurred any new responsibility, or gave further time, or changed in any manner their relation to Wilcox in respect to his indebtedness to them. But the judge held that the plaintiffs were indorsees for value, and protected from all the equities of the maker. Upon this ruling the jury returned a verdict for the plaintiff, and the defendant excepted. The superior court at general term affirmed the view of the law taken by the judge at the trial, and this petition was filed to reverse the judgment of affirmance.

Ball and Skinner, for the plaintiff in error.

Miner, Clark, and Oliver, for the defendants in error.

By Court, SWAN, J. The question made in this case is, whether, if a debtor transfers to his creditor a negotiable note before due, as collateral security to a pre-existing debt, without any consideration other than the mere fact of a prior indebtedness (for all other consideration in the case before us is repelled by the testimony, particularly the testimony of the plaintiffs), the creditor holds it discharged from all defenses and equities existing between the maker and debtor.

There are many rules of law which, in their application to particular cases, do great injustice, but which are inexorably

applied, because the general benefits derived from them can only be obtained by uniform adherence to them; and the individual cases of hardship are altogether outweighed by the public benefits and public confidence derived from uniform application. Among these rules are some relating to negotiable paper. The necessities of the commercial world require that bills of exchange and promissory notes should possess some of the attributes of money and exchangeable value; and to clothe them with these attributes, and to give parties confidence in their reception, it is necessary to protect them in the hands of a holder for value from defenses growing out of the dealings of the prior parties. The rule frequently operates harshly and unjustly, and, being founded on commercial policy, is therefore applicable only where the interests of trade require it. Hence the rule that if the holder has not taken the paper for value, or in the usual course of trade, or in ignorance of the defects, he stands in no better situation than the indorser from whom he received it; commercial policy does not require such a holder to be protected against the defenses of the prior parties. But if the paper has been transferred before due, in the usual course of trade, for value, to a person who had no notice of such defects, commercial policy requires that such *bona fide* holder shall hold the paper discharged from such infirmities. The exceptions above stated are as fundamental as the rule itself. The question now before us, then, is whether the plaintiffs in this case took the paper for value in the usual course of trade.

The weight of authority seems to settle the principle, that where a negotiable instrument of a third person is transferred before due, in payment of a pre-existing debt, and is *bona fide* received by the creditor, without notice, the defense existing as between the prior parties cannot be set up against such holder: *Bond v. Central Bank*, 2 Ga. 106; *Valette v. Mason*, 1 Ind. 288; *Homes v. Smyth*, 16 Me. 177 [33 Am. Dec. 650]; *Williams v. Little*, 11 N. H. 66; *Reddick v. Jones*, 6 Ired. L. 107 [44 Am. Dec. 68]; *Swift v. Tyson*, 16 Pet. 1; *Brush v. Scribner*, 11 Conn. 388 [29 Am. Dec. 303], where the English cases are reviewed; *Carlisle v. Wishart*, 11 Ohio, 172. The payment of a debt is as much a commercial transaction as a sale of goods; and if one parts with his goods or money upon the faith of a transfer of negotiable paper as payment, and is protected from equities, there seems to be an equally good reason for holding that if one, giving credit to such paper, parts with and discharges an obligation to pay money, he has, in contemplation of law, parted with prop-

erty of as high a character as goods. After receiving negotiable paper in payment of a pre-existing debt, the creditor cannot maintain an action upon the debt he has thus discharged, merely because the maker of the negotiable paper he has received in payment might have had some defense against it in the hands of the payee from whom he received it. For the creditor, having parted with a right, there is a sufficient consideration; and something more is necessary to enable him to recover his debt which he has surrendered. He may be restored to his right to recover the amount of his debt, if the maker afterward avoids the note or paper in his hands, by a defense which arose prior to the indorsement. But the creditor, having thus parted with his property, is justly remitted to his original right to recover his debt, in like manner and to the like extent as where the negotiable paper of a third person is taken for goods sold, upon failure afterwards to recover upon the paper transferred in payment of the goods. There is, therefore, no substantial difference between the consideration for the transfer of negotiable paper in payment of a precedent debt, or in payment of goods sold at the time of such transfer. Such was the principle decided in *Swift v. Tyson*, 16 Pet. 1; and in relation to which Chancellor Kent, in a note to 3 Com. 81, 8th ed., 97, note c, says he is inclined to concur, as the plainer and better doctrine.

It will be perceived that the ground upon which the holder of negotiable paper taken in payment of a precedent debt is held to be a holder for value is, that he receives the paper as a payment of the original debt, whereby the original debt is, at least for the time being, discharged. The creditor is in effect a purchaser of the negotiable paper; and for it he parts with the original obligation of the precedent debt, changing thereby his relations to his debtor and the liability of the debtor to him. And it should be borne in mind that it is this new adjustment of the precedent debt that makes the creditor a holder for value. It seems necessary to briefly refer to these cases in relation to the consideration growing out of the payment of a precedent debt, by the transfer of negotiable paper, to better understand the rule in relation to the rights of the holder of negotiable paper received as security merely for a precedent debt.

When the note of a third person is transferred *bona fide* before due as collateral security and for value, such as a loan or further advancement, or a stipulation, express or implied, of further time to pay a pre-existing debt, or a further credit, or a change of securities of a pre-existing debt, or the like, the

assignee of such collateral will be protected from infirmities affecting the instrument before it was thus transferred. If, however, a note is transferred as collateral security to a pre-existing debt without any consideration, so that the transfer is a mere voluntary act on the part of the debtor, and is received by the creditor without incurring any new responsibility, parting with any right or subjecting himself to any loss or delay, and leaving the subsisting debt precisely in the condition it was before such collateral was transferred, the holder has not taken the note for value, nor in the usual course of trade; and to hold otherwise would be a departure from the established rules of law governing the rights of parties to negotiable paper, and losing sight of the grounds of public policy upon which the law is founded.

The case of *Bay v. Coddington*, 5 Johns. Ch. 54 [9 Am. Dec. 268], *Coddington v. Bay*, 20 Johns. 637 [11 Am. Dec. 342], has been frequently commented upon; and sometimes treated as a case relating to a transfer of negotiable paper in payment of a precedent debt, and sometimes as a case relating to the transfer of negotiable paper as security merely for liabilities previously incurred. This confusion has arisen from what was said by senators in the court of errors. Chancellor Kent, in delivering his opinion in the original case, said: "The notes were not negotiated to them in the usual course of trade or business, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility on the strength and credit of the notes:" 5 Johns. Ch. 57. We are not aware of any case which impairs the principle thus stated. When collateral security has been taken for a precedent debt, courts have, from facts and circumstances, sometimes implied a stipulation on the part of the creditor to give further time for payment, and thus found a consideration for the transfer of the collateral. We do not impugn such finding by courts. In the present case, however, any such stipulation, express or implied, is repelled by the testimony, and did not enter into the consideration of the court.

When, then, a debt is created without any agreement for security, and the debtor afterward, without any obligation to do so, as in the case before us, voluntarily transfers a negotiable instrument to secure the same, and both parties are left in respect to the debt *in statu quo*, we are unable to see what value or consideration, recognizable by traders, was paid for the instrument, or how such gratuitous favor can be deemed a usual

transaction in the course of trade, or indeed as any trade or reciprocity of values at all. To hold that the unchanged condition of the precedent debt formed a present consideration for doing what the obligations of that debt did not require, is raising a consideration by assertion, when none in fact exists.

Our view of the law upon this subject is sustained by direct and well-considered adjudications in Maine: *Bramhall v. Beckett*, 31 Me. 205; in New Hampshire: *Jenness v. Bean*, 10 N. H. 266; *Williams v. Little*, 11 Id. 66; Virginia: *Prentice v. Zane*, 2 Gratt. 262; Pennsylvania: *Petrie v. Clark*, 11 Serg. & R. 377 [14 Am. Dec. 636]; *Kirkpatrick v. Muirhead*, 16 Pa. St. 117; Tennessee: *Kimbro v. Lytle*, 10 Yerg. 417-428 [31 Am. Dec. 585]; Mississippi: *Brooks v. Whitson*, 7 Smed. & M. 513; and New York: *Cases supra*. The same rule is recognized in North Carolina: *Reddick v. Jones*, 6 Ired. L. 109 [44 Am. Dec. 68], *per* Ruffin, C. J.

Some cases are referred to by the court below and the counsel for the defendant in error, as adopting a different rule, which it is proper to notice; for we think it will be found that they do not conflict with the rules we have stated.

In the case of *Atkinson v. Brooks*, 26 Vt. 569 [62 Am. Dec. 592], it was held that the indorsee of a bill of exchange, transferred to him as collateral security for a pre-existing debt past due, is *prima facie* a holder for value, and takes the bill discharged of equities. The court say: "One would scarcely part with the collateral unless he expected more or less indulgence on account of it, and when the prior debt is suffered to remain uncollected, it is, under the circumstances, fair to conclude such was the stipulation." And in summing up, the court say: "A note or bill negotiated in security for a debt not yet due is not upon sufficient consideration, ordinarily, unless the creditor wait, in faith of the collateral, after the debt becomes due. So, too, probably, if it was shown, positively, that the holder gave no credit to the indorsed bill, and did, in no sense, conduct differently on that account, he could not be regarded as a holder for value."

In the case of *Gibson v. Conner*, 3 Ga. 47, it was held that a note transferred as collateral security for a pre-existing debt came within the common commercial rule. The case is decided upon the authority of the *obiter dictum* of Justice Story, in the case of *Swift v. Tyson*, 16 Pet. 1. The court seem to concede that there should be some valuable consideration for the transfer, and they say that "the forbearance to press the debt, which is usually a part of the understanding of the parties in such cases, is valuable to the transferrer." In the case of *Valette v.*

Mason, 1 Ind. 263, it does not appear whether the note was transferred, as collateral security, at the time the debt was created, and as a part of the consideration therefor afterward. In *Palmer v. Richards*, 1 Eng. L. & Eq. 529, the drawer of a bill of exchange, which had been accepted, indorsed it in blank, and delivered it to A, as agent, to get discounted; but A, instead of doing so, negotiated it to B, a *bona fide* holder, as security for an advancement of money; and it was held a valid indorsement by the drawer to B.

In *Gwynne v. Lee*, 9 Gill, 137; *Washington Bank v. Lewis*, 22 Pick. 24, *Chicopee Bank v. Chapin*, 8 Met. 40, the collaterals were transferred as security when the debt was contracted, and formed a consideration for the credit. The same is fairly to be inferred in the case of *Valette v. Mason*, 1 Ind. 288.

In *Williams v. Smith*, 2 Hill (N. Y.), 301, the collaterals were transferred as security, upon an agreement to become indorser, and indorsements were afterward made in pursuance of the agreement, and the court held that the consideration for the transfer was tantamount to an advance upon a purchase, and not a collateral security. The case of *Bank of the Metropolis v. New England Bank*, 17 Pet. 174, S. C., 1 How. 234, related to mercantile lien, and has no application to the question before us.

The remark of Judge Martin, in *King v. Gayoso*, 4 Cond. La. 553, quoted in the opinion below, that a note or bill, negotiated to raise money by discount, or pledge, may be deemed a transaction in the usual course of business, is in accordance with our view of the law.

All that is said in *Swift v. Tyson*, 16 Pet. 1; *Blanchard v. Stephens*, 3 Cush. 168 [50 Am. Dec. 723]; *Carlisle v. Wishart*, 11 Ohio, 172; *Poirier v. Morris*, 20 Eng. L. & Eq. 103, in regard to the rule to be adopted where negotiable paper is taken as collateral security for a pre-existing debt is *obiter*, and if entitled to any weight, does not sanction the idea that the creditor receiving such collateral must be treated as a holder for value and in the usual course of trade, where there is no agreement to wait on the prior debt, or to forego any right whatever. Nor have we been able to find any case in which a negotiable instrument had been transferred to a creditor merely as a collateral security for an existing debt, the right of action on the original not being altered, no stipulation, express or implied, for further time to pay existing or other new consideration intervening, that the creditor has been held to be an indorsee and holder, in the usual course of trade, for value.

In the case before us, the plaintiffs, when they received the notes as collateral security, parted with nothing. They gave no credit for them. They are in no sense purchasers of the notes. The creditor was to derive no benefit whatever from their transfer. The debt which the collaterals secured was unaffected by the transfer. The transaction was simply a naked pledge of negotiable instruments, collateral to a pre-existing debt, without any new consideration whatever moving between the parties.

The plaintiffs, therefore, were not holders for value, in the usual course of trade, and the notes in their hands were subject to the equitable defenses of the maker.

Some apology is needed for occupying so much space in the expression of our views in this case. We entertain the highest respect for the judicial determinations of the superior court of Cincinnati in general term; and inasmuch as the grounds of their decision in this case have been reported, and involve a very important rule of mercantile law, we deemed it due to the profession, and to the deserved reputation of the court whose judgment we reverse, to state fully our reasons for so doing.

BARTLEY, C. J., and BRINKERHOFF, BOWEN, and SCOTT, JJ., concurred.

WHETHER ONE WHO TAKES NEGOTIABLE INSTRUMENT AS COLLATERAL SECURITY for a pre-existing debt without any new or distinct consideration is or is not a *bona fide* holder thereof for value, is a question upon which judicial opinion is divided. The following are cases holding the same doctrine as that of the principal case: *Bay v. Coddington*, 9 Am. Dec. 268, note 272, where a large number of cases on both sides of the question are collected; *Coddington v. Bay*, 11 Id. 342; *Depeau v. Waddington*, 36 Id. 216, note 224, where other cases are collected; *Stalker v. McDonald*, 40 Id. 389, note 406, where many cases are collected, particularly from the New York reports: *Bank of Mobile v. Hall*, 41 Id. 72; *Reznor v. Hatch*, 7 Ohio St. 255; *City of Cleveland v. State Bank*, 16 Id. 269; *Smith v. Worman*, 19 Id. 150; *Lewis v. Anderson*, 20 Id. 286; *Copeland v. Manton*, 22 Id. 402, the last four citing the principal case. The following cases hold the contrary doctrine: *Atkinson v. Brooks*, 62 Am. Dec. 592; *Allaire v. Hartshorne*, 47 Id. 175, note 182, where other cases are collected; *Manning v. McClure*, 36 Ill. 495; *Straughan v. Fairchild*, 80 Ind. 598, the last two citing the principal case.

THE PRINCIPAL CASE IS CITED to the point that a holder of a negotiable instrument who does not take it for value, and in the usual course of trade, is in no better position than the indorser from whom he took it, in *Gebhart v. Sorrelle*, 9 Ohio St. 466; and in *Baily v. Smith*, 14 Id. 403, and *First National Bank v. Fowler*, 36 Id. 529, to the point that the indorsee of a note as collateral security for the consideration of extending the time on another debt is a *bona fide* holder.

REYNOLDS v. TUCKER AND WIFE.

[6 OHIO STATE, 516.]

DEFENDANT MAY PROVE, IN MITIGATION OF DAMAGES, IN ACTION OF SLANDER for words spoken against the chastity of the plaintiff's wife, that said wife, before her marriage with the plaintiff, had lived alone with him in the same house, where the fact of their so living was known to the defendant when he spoke the words.

ERROR IN REFUSING TO PERMIT COMPETENT TESTIMONY TO GO TO JURY is not cured by consent of the adverse party afterward to go into the inquiry proposed by the rejected testimony.

ERROR to the district court of Lorain county. The action was case for slanderous words, and the actionable words charged in the declaration were that the wife of the plaintiff was a whore, and defendant could prove it by Thomas Goman, and that she was Thomas Goman's concubine; that she was a whore before she came from Vermont, and was still a common whore for anything that came along. The defendant pleaded the general issue, and the jury rendered a verdict in favor of the plaintiffs below for six dollars. On the trial the defendant below offered to prove that the plaintiffs below had lived together alone in one house before they were married, which fact was well known to said defendant at the time when they so lived together, which was eight or nine years ago. The court sustained the objection of the plaintiffs to the admission of this testimony, but subsequently, while the same witness was under cross-examination, the plaintiffs offered to go into the inquiry, but their offer was declined by the defendant. To the refusal of the court to admit this evidence the defendant below excepted.

Stevenson Burke, for the plaintiff in error.

H. D. Clark and J. Myres, for the defendants in error.

By Court, BOWEN, J. For the purpose of mitigating damages, it was competent for the defendant, under the general issue, to prove facts connected with the speaking of the words, which were from the nature of them calculated to induce the belief on his part that the plaintiff's wife was guilty of the impropriety imputed to her, provided such proof did not establish a justification. If an unmarried man and woman live alone in the same house, it may and very likely would raise an inference unfavorable to the latter's chastity. It may induce a belief that adultery has been committed by her, while holding that relation. Still, however, it does not convict her of the act. Such mode of

living may be entirely innocent and proper, adopted and continued for the most upright purpose. The whole reason of the rule for admitting such evidence is to relieve the defendant from the consequences which attach to malice in the speaking of the words. He may show particular acts of the plaintiff which unexplained gave him just reason to believe in the truth of the declarations which he uttered; but when explained and understood, may be found to be compatible with the plaintiff's innocence. It is permitted upon the ground that the proof, when introduced, may serve to show that the defendant, in making the charge, was mistaken—that he misconstrued the act or conduct of the party, by supposing it to be criminal, while in fact it was not. When the testimony can have no other effect than to make apparent the plaintiff's guilt, and prove the truth of the words spoken, its introduction to the jury must necessarily tend to justify the speaking, and not to mitigate damages, by showing the absence of malice. To be competent for the former purpose, the facts relied on must be pleaded specially, and cannot be given in evidence under the general issue. Such is the rule in *Wilson v. Apple*, 3 Ohio, 270; *Dewitt v. Greenfield*, 5 Id. 225; *Haywood v. Foster*, 16 Id. 88. The fact which the defendant offered to prove was erroneously excluded from the jury.

The evidence having been improperly rejected by the court below, was the error cured by the offer of the plaintiffs, while the witness was on cross-examination, to go into the inquiry which the defendant's question proposed?

The error of the court consisted in ruling against the competency of the evidence. The consent of the party in whose favor the ruling was made, afterwards to admit the evidence, could not relieve the party from the effect of the erroneous decision of the court. The jury would receive it with knowledge that the court had pronounced it incompetent, and it would go to them under the stamp of judicial disapproval. It can hardly be said, in such case, that the party would derive the same benefit from it that he would have done had he been allowed to examine the witness, as of right, upon the subject, by the sanction of the judges. When the court had expressed its opinion that the evidence should not be considered by the jury, the latter would scarcely give it any consideration when admitted by the mere favor of the other side.

The consent of the plaintiffs to go into the examination which was proposed by the defendant could not restore the latter to the same condition before the jury that he would have sus-

tained if the court had permitted him, as of right, to make the inquiry of the witness.

Judgment reversed and cause remanded.

BARTLEY, C. J., and SCOTT, J., concurred.

SWAN, J., concurred as to the first point, but dissented as to the second.

BRINKERHOFF, J., delivered a dissenting opinion.

WHAT EVIDENCE ADMISSIBLE IN MITIGATION OF DAMAGES IN ACTION OF SLANDER: See *Stallings v. Newman*, 62 Am. Dec. 723, note 727; *Moore v. Clay*, 60 Id. 461, note 463, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Westlake v. Westlake*, 34 Ohio St. 631, to the point that, in Ohio, words imputing want of chastity to a woman, either married or single, have always been actionable *per se*.

ERROR IN REJECTING EVIDENCE, WHEN CURED: See *Schlencker v. Risley*, 38 Am. Dec. 100; *Potter v. Washburn*, 37 Id. 615; *Sanders v. Johnson*, 36 Id. 564.

WEAVER v. GREGG.

[6 OHIO STATE, 547.]

DOWER IS, WHILE INCHOATE, SUBJECT TO SUCH MODIFICATIONS and qualifications as the legislature may see proper, for reasons of public policy, to impose.

WIFE'S INCHOATE RIGHT OF DOWER IN LANDS HELD BY HER HUSBAND AS CO-TENANT is divested by a sale thereof, under the Ohio act providing for the partition of real estate, and the entire estate passes to the purchaser at such sale.

PETITION for dower. The opinion states the case.

Hedges and Cradlebaugh, for the petitioner.

Page and Benick, for the defendant.

By Court, BRINKERHOFF, J. This is a petition for dower, filed in the common pleas of Pickaway county, appealed thence into the district court of that county, and by it reserved for decision here. The facts of the case are admitted to be substantially these:

In 1819 the plaintiff intermarried with her late husband, George Weaver, who, during the coverture, was seised as tenant in common of the one undivided fourth part of certain lands, situate in said county, and in the petition particularly described.

On the twenty-second day of October, 1840, proceedings under the statute were commenced in the common pleas of

Pickaway county to obtain partition of said lands; and such proceedings were thereupon regularly and duly had, and the commissioners appointed by the court to make partition having reported that the lands could not be divided without manifest injury to the premises, the same were ordered to be sold by the sheriff. All which was done; the sale confirmed by the court; deed ordered and duly executed by the sheriff to the purchaser, under whom the defendant now claims; and the one fourth of the net proceeds of the sale distributed to George Weaver, the husband of the plaintiff.

The plaintiff was not made a party to these proceedings; and in August, 1848, George Weaver died. On this state of facts the question is presented, Is the plaintiff now entitled to dower in the premises, notwithstanding the sale in partition? or, on the other hand, was her inchoate right of dower extinguished by that sale?

As there is no reported case in Ohio which involves this question, it seems to be now for the first time presented to the court of last resort in this state. Nor have we been able to find a case anywhere arising under a statute so nearly identical with our own as to entitle it to any decisive weight as a precedent. In *Jackson v. Edwards*, 7 Paige, 386, a case under the statutes of New York on the subject of partition, and in which the wife had been made a party to the proceeding, the chancellor held that the wife's inchoate right of dower was divested, and passed by the sale. But the phraseology of the New York statute differs in important particulars from that of our own; and, moreover, when the same case was before the court of errors on appeal, *Jackson v. Edwards*, 22 Wend. 498, the only members of the court who delivered opinions in the case differed on this point, and the case finally went off on other questions. We are therefore thrown back upon the light of general principles, and the particular provisions and policy of our own statute.

Dower is not the result of contract, but is the creature of positive law, founded on reasons of public policy, and subject, while it remains inchoate, to such modifications and qualifications as legislation, for like reasons of public policy, may see proper to impose: *Moore v. Mayor etc. of New York*, 8 N. Y. 110 [59 Am. Dec. 473], in which it was held that "where, in pursuance of an act of the legislature, lands are taken by a municipal corporation for a public use, upon an appraisement and payment of their value to the holder of the fee, the corporation

acquires an absolute title to them, divested of any inchoate right of dower existing in his wife." See also *Guyne v. City of Cincinnati*, 3 Ohio, 24 [17 Am. Dec. 576].

If, however, we were to consider dower as resulting from and embraced within the implied terms of the marriage contract, still it must be held to be limited by such boundaries, and subject to such incidents as are affixed to it by laws existing and operative at the time of the marriage.

The plaintiff married her late husband in 1819; and since the year 1804 statutes authorizing any joint tenant, tenant in common, or coparcener to compel partition, and to compel a sale of the undivided estate in case the same proved to be incapable of actual partition without manifest injury to the estate, have been in force in Ohio, with provisions substantially similar, in this respect, to that now in force, and under which this sale was made.

This act of February 17, 1831, provides for the appointment, by the court of common pleas to which the petition for partition shall be addressed, of three disinterested freeholders, to make partition of the estate; that if they shall be of opinion that the same cannot be divided without manifest injury to the value thereof, they shall return to the court a just valuation of the estate; that either of the parties may thereupon elect to take the estate at such valuation; and on failure of any such election, that the court may order the sheriff to make sale of the estate as under judgment and execution, so that the same be not sold for less than two thirds of the aforesaid valuation; that on approval of such sale by the court the sheriff shall execute a deed to the purchaser, and the proceeds of the sale "shall be distributed and paid by order of said court to and among the several parties entitled to receive the same, in lieu of their respective parts and proportions of said estate or estates, according to their just rights and proportions."

Now, in case of a sale as provided for in this statute, where the husband is the owner of the fee and the wife has but a contingent right of dower, how, and to whom, is this distribution of the proceeds of the sale of the estate made? Always, in practice, so far as we know, it is made to the husband, and to him alone. And we think properly, for he is the sole representative of the estate. She has a contingent possibility of interest in it, which may be released, but no property, no actual interest in it, which is the subject of grant or assignment: *Miller's Adm'r v. Woodman*, 14 Ohio, 518. Nor is the value of her possible and

contingent interest capable of estimate with any degree of accuracy: *Moore v. Mayor etc. of New York, supra*. And on this point we may consider the rule of distribution as settled by the universal and unvarying practice.

Dower, then, being a creature of positive law, and as such subject to legislative modification, limitation, and qualification, the question before us is one of legislative intention. Did the general assembly, in providing for the sale of estates in proceedings in partition, intend that the entire estate should pass to the purchaser divested of a wife's inchoate right of dower?

In seeking for the intention of the legislature on this point, and in the absence of any clear and decisive expression of that intention in the language of the statute, it seems to us that the maxim, *Argumentum ab inconvenienti plurimum valet in lege*, very properly and forcibly applies; for, "if the words used by the legislature have a necessary meaning, it will be the duty of the court to construe the clause accordingly, whatever may be the inconvenience of such a course. But unless it is very clear that violence would be done to the language of the act by adopting any other construction, any great inconvenience which might result from that suggested may certainly afford fair ground for supposing that it could not be what was contemplated by the legislature, and will warrant the court in looking for some other interpretation:" *Broom's Legal Maxims*, 140, 141.

To apply this maxim to the case before us, let us suppose two coparceners, each the owner of an equal undivided half of an estate inherited from a common ancestor. One of them has a wife, the other is unmarried. One of them petitions for partition of the common estate, which is found to be incapable of actual partition, and is ordered to be sold. It is understood to be the settled law that the inchoate right of dower of the wife is not divested by the sale. The consequence is, inevitably, that the estate must be sold for much less than it would otherwise have brought. Yet, on the distribution of the proceeds of the sale, the husband comes in for an equal share; and the loss consequent on the existence of the contingent incumbrance falls alike on the unmarried and married coparcener. This is a necessary result; and it is not only inconvenient, but grossly unjust: too inconvenient and too unjust to permit us to suppose it to have entered into the intention of the legislature.

We are of opinion, therefore, that it was the intention of the legislature, by a sale in partition, to divest the wife of her inchoate right of dower. In so holding, we do not subject this

right at all to the will or caprice of the husband. The sale is the act of the law, designed to do justice to joint owners and render estates available, and put forth only when, from the fact that the estate is incapable of actual partition, the necessities of the case require it. The legislature has deemed it more important to the public interest to render estates available to their owners without sacrifice of their value, by a sale in case of necessity, than to preserve in all cases whatsoever the wife's remote and contingent interest, at the expense of parties on whom she can have no proper claim.

The fact that the wife was not a formal party to the proceeding in partition does not, we think, at all alter the case. The terms of the statute do not require that she should be made a party, and we see no good reason why it should be required.

On the whole, our view of the question is this: the right of dower in the wife subsists in virtue of the seisin of the husband; and this right is always subject to any incumbrance, infirmity, or incident which the law attaches to that seisin, either at the time of the marriage or at the time the husband became seised. A liability, to be divested by a sale in partition, is an incident which the law affixes to the seisin of all joint estates; and the inchoate right of the wife is subject to this incident. And when the law steps in and divests the husband of his seisin and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted.

. Petition dismissed.

BARTLEY, C. J., and SWAN, BOWEN, and SCOTT, JJ., concurred.

PARTITION SALE DIVESTS WIFE'S RIGHT TO DOWER in lands of her husband held by him in common: See *Lee v. Lindell*, 64 Am. Dec. 262, note 265.

INCHOATE RIGHT OF DOWER, NATURE AND EXTENT OF: See *Moore v. Mayor etc. of New York*, 59 Am. Dec. 473, note 475. This right is not a part of the marriage contract, but results from wedlock by the operation of existing laws at the time of the husband's death: *Meliet's Appeal*, 55 Id. 573, note 577. And the legislature has power to regulate the right of dower while it is inchoate: *Bennett v. Harms*, 51 Wis. 258, citing the principal case. A wife has a contingent possibility of interest in dower, which may be released by her, but she has no property therein, no actual interest in it, which is the subject of grant or assignment: *Singree v. Welch*, 32 Ohio St. 325, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Verry v. Robinson*, 25 Ind. 21; and in *Rowland v. Prather*, 53 Md. 243.

BLAKE v. GRAHAM.

[6 OHIO STATE, 580.]

RECORD OF DEED IS CONSTRUCTIVE NOTICE TO THOSE ONLY WHO CLAIM through or under the grantor by whom the deed was executed.

PURCHASER OF REAL ESTATE IS NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE of prior equities which are disclosed in a deed duly recorded from the executor of the person from whose heirs he purchases.

BILL to quiet title. The opinion states the case.

Mason and Estep, for the plaintiffs.

J. C. Hance, for the defendants.

By Court, BRINKERHOFF, J. The plaintiffs bring their action under the code, in the nature of a bill in chancery, to quiet title to and obtain partition of a piece of land in Tuscarawas county, described in the petition and in the possession of the defendants.

In the year 1800 Dr. Felix Lynn of Northampton county, Pennsylvania, was the undisputed owner of the premises in controversy, and is the source of title common to both parties.

In 1807 Dr. Lynn made his last will and testament, directing the sale by his executors of certain lands therein described, and authorizing his executors to make deeds for the same to the purchasers; but in his will he does not in any way refer to or mention, specifically, his lands in Ohio, and at the close of his will, and following immediately after the clause naming his executors, he authorizes them to make and execute all deeds of conveyance, "according to this my last will and testament."

Dr. Lynn having died on the sixteenth of January, 1809, his will was proved in Northampton county, Pennsylvania, and letters testamentary were issued; but the will was never admitted to probate in Ohio, nor were any other proceedings ever had to effectuate the same under the laws of this state.

On the first day of May, 1809, Dr. Lynn's executors executed in Northampton county, Pennsylvania, a deed in fee-simple for the land in controversy to George Kintner, reciting therein that Dr. Lynn, in his life-time, had executed to John Heckawelder a power of attorney, authorizing him to make sale of these lands; that Heckawelder had accordingly entered into a contract for their sale to said Kintner, and had received a part of the purchase money thereof in the life-time of Dr. Lynn; that they, as executors, had received the balance of said purchase money—in consideration of all which, etc., they make the deed.

Under this title thus conveyed, and through sundry subsequent conveyances and descents, the plaintiffs claim.

In 1838 the New Philadelphia Lateral Canal Company, being in possession of the premises in dispute, and suspecting the invalidity of the title under which it then held them, procured from the heirs of Dr. Lynn, "in consideration of one dollar to them in hand paid," a deed of bargain and sale in fee-simple, but without warranty, for the premises. In January, 1842, the canal company conveyed to Fleming Willet; and in June, 1844, Willet conveyed to the defendant Graham; and under this title the defendants claim.

Before proceeding to the consideration of the principal questions in the case, it will be proper to observe that all the deeds above mentioned were duly recorded in the order of their dates; that the circumstances of the case, as they appear in the proofs, are not such as to give rise, on the part of either plaintiffs or defendants, to any claim under the statute of limitations; it is not claimed that the defendants had actual notice of plaintiffs' claim to the premises; nor is it urged in behalf of the plaintiffs that the conveyance by the executors of Dr. Lynn to Kintner vested in Kintner, or in those claiming under him, a perfect legal title to the premises. And if it were urged, we think it could not be maintained. The will of Dr. Lynn directed certain lands to be sold, but in no way mentioned or referred to these lands; it then authorized the executors to make conveyances according to the will; and we are of opinion that by any proper construction of the will the application of the powers conferred by the latter clause must be restricted by the directions of the former.

But admitting that the will by its terms authorized the executors to convey these Ohio lands, still it could, being a foreign will, have of itself no extraterritorial force or effect. To give it effect in Ohio, it was necessary that it be admitted to probate in Ohio; and in order to enable the executors to carry into effect the real contracts of the testator in respect to lands in this state, an order of the court of common pleas of the county in which the lands were situate was requisite: 1 Chase's Stats. 480, 563, 572.

It is, however, claimed by the plaintiffs, that the facts recited in the deed of the executors of Dr. Lynn to Kintner, to wit, that Dr. Lynn in his life-time had authorized Heckawelder to sell these lands; that he had, prior to the death of Lynn, contracted to sell them to Kintner, and received a part of the purchase money; and that the balance of the purchase money was paid by Kintner to the executors—constitute an equitable title in

favor of Kintner, and those holding under him, which may be enforced in equity against a subsequent purchaser with notice. They furthermore claim that the deed from the executors of Dr. Lynn to Kintner, having been duly recorded, the defendants, claiming under a subsequent deed directly from the heirs of Dr. Lynn, were bound to take notice of the recorded deed from the executors of Lynn to Kintner, and are chargeable with a knowledge of the facts stated in its recitals. And these facts being established in the proofs to our reasonable satisfaction, a question of constructive notice—decisive of this case—is presented.

Were the defendants, being purchasers without actual notice of the deed of Dr. Lynn's executors, bound to take notice of that deed? and are they chargeable with knowledge of its recitals?

It is well settled that the record or registry of a deed is constructive notice only to those who claim through or under the grantor by whom such deed was executed: *Leiby v. Wolf*, 10 Ohio, 83; *Stuyvesant v. Hall*, 2 Barb. Ch. 158; *Murray v. Ballou*, 1 Johns. Ch. 574, 575; *Keller v. Nutz*, 5 Serg. & R. 252-254; *Lightner v. Mooney*, 10 Watts, 412; *Bales v. Norcross*, 14 Pick. 224 [28 Am. Dec. 271]. In the last-named case the court say: "To hold the proprietors of land to take notice of the records of deeds, to determine whether some stranger has without right made conveyances of their lands, would be a most dangerous doctrine, and cannot be sustained with any color of reason or authority." "Where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have notice of such fact:" Fonbl. Eq., b. 3, c. 3, sec. 1, note b.

"A purchaser of the legal title cannot be affected by any latent equity of which he has not actual notice, or which does not appear on some deed necessary to the deduction of his title:" 2 Sugden on Vendors, c. 17, note 430.

These rules rest on the obvious reason that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing, link by link, his chain of title on the record, necessarily pass under his inspection.

Now, to apply these rules to the case before us. The grantors in the recorded deed, of which and its recitals it is claimed the defendants were bound to take notice, are the executors of Dr. Lynn; but the defendants do not claim through them, nor do they claim through that deed. They make a perfect legal title

without reference to that deed, and did not, and had no occasion to, offer it in evidence. They deduce no title through it, nor from the grantors named in it. They claim title from and through the heirs of Dr. Lynn, and not from or through his executors; and as to them and those under whom they claim, the executors are mere strangers and unauthorized volunteers. This application of well-settled rules is, we think, decisive of the case.

We are of opinion that the defendants are not chargeable with notice of the recitals in the deed from the executors of Dr. Lynn, nor of the latent equities therein disclosed.

Petition dismissed.

BARTLEY, C. J., and SWAN, BOWEN, and SCOTT, JJ., concurred.

RECORD OF CONVEYANCE IS ONLY NOTICE TO AFTER-PURCHASERS under the same grantor: *Roberts v. Bourne*, 39 Am. Dec. 614.

RECORDING OF EQUITABLE TITLE IS NO NOTICE TO SUBSEQUENT PURCHASER of the legal title: *Doswell v. Buchanan's Ex'rs*, 23 Am. Dec. 280.

RECITALS IN DEED DO NOT ESTOP MERE STRANGERS or those who claim by title paramount, nor are they binding on persons claiming by an adverse title: See note to *Graff v. Castleman*, 16 Am. Dec. 754.

STATE v. HARPER.

[6 OHIO STATE, 607.]

BOND OF COUNTY TREASURER IS CONTRACT THAT HE WILL NOT FAIL, UPON ANY ACCOUNT, to receive and safely keep the public money, and pay it out according to law.

THAT MONEY WHICH CAME TO HANDS OF COUNTY TREASURER WAS STOLEN from him without his fault is no defense to an action upon his official bond.

IRRELEVANT MATTER IN PLEADING MIGHT BE STRICKEN OUT on motion of the party prejudiced thereby, prior to the act of 1856 amending the Ohio code of civil procedure.

ACTION under the code, brought upon the official bond of George Harper as treasurer of Wyandot county. At his settlement before going out of office there was found a balance due from him of over two thousand dollars, which he refused to pay to his successor. The bond sued on contained a condition that "Harper shall honestly and faithfully pay over, during his continuance in office, all moneys that shall come into his hands for state, county, and township, or for other purposes, according to law." Harper filed an answer, alleging that his residence was forcibly broken open by some persons unknown, and the sum of

two thousand and ten dollars stolen therefrom without any fault or want of care on his part, and that this was the same money sought to be recovered in this action. Plaintiff's counsel moved to strike this answer from the files, because it contained no valid ground of defense.

J. D. Sears, for the plaintiff.

C. K. Watson, R. McKelly, and J. S. Plants, for the defendants.

By Court, BOWEN, J. The act prescribing the duties of county treasurers, Stats. 1008, provides for their election, term of office, oath, and bond. It makes them public officers, and requires of them the performance of responsible duties. One who is elected to and enters upon the duties of the office must give bond with four or more freehold sureties, conditioned for the paying over of all moneys which shall come into his hands for state, county, township, or other purposes. He shall, on the first Monday of June, annually, make a full settlement of his accounts with the commissioners of the county, and on going out of office it is his duty to deliver to his successor all public money in his possession belonging to the office.

By section 24 of the act, if any county treasurer shall "fail to pay over all money with which he shall stand charged at the time and in the manner prescribed by law, suit may be instituted against him and his sureties in the court of common pleas of his county; and it is made lawful for the court at the first term thereafter to render judgment against them for the amount due from such treasurer, with legal interest, and a penalty of ten per centum thereon; from which judgment there shall be no appeal, or stay of execution, and the property of such delinquent treasurer and his sureties may be sold, without appraisement, to satisfy such judgment."

By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail upon any account to do those acts. It is in effect an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and disbursement of the money. Hence it is not a sufficient answer, when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny of the money be shown to be without his fault, still, by the terms of the law and of his

contract, he is bound to make good any deficiency which may occur in the funds which come under his charge: *Muzzy v. Shattuck*, 1 Denio, 233; *United States v. Prescott*, 3 How. 578; *Commonwealth v. Comly*, 3 Pa. St. 372.

The distinction between this and a common case of bailment is, that the law of the latter is generally founded upon the absence of any positive engagements between the parties to the hiring, or, as it is called, the *locatio conductio*, and therefore the question arises, What obligations may, with reference to public policy and general convenience, be implied by law in the absence of such positive engagements? The express contract of the parties may, as in the case now under consideration it has done, vary or supersede those derived from the law of bailments: Story on Bailm. 7.

The one hundred and eighteenth section of the code authorizes irrelevant matter inserted in any pleading to be stricken out on motion of the party prejudiced thereby. This made it competent for the plaintiff to move the court to strike out the defendants' answer, if the matters which it contained were irrelevant, and formed no ground of defense to the action. The motion in such case took the place and served the office of a demurrer. By the act of February 20, 1856, amendatory of the one hundred and first section of the code, the plaintiff may demur to the answer for insufficiency, and this law necessarily supersedes the practice of moving to strike the answer from the files. The answer and motion in this case were filed before the adoption of the last-named act, and are therefore not affected by it.

The defendants' answer is set aside for insufficiency, and the cause remanded for further proceedings.

BARTLEY, C. J., and SWAN and BRINKERHOFF, JJ., concurred.

SCOTT, J., having formerly been of counsel in this case, did not participate in its decision.

WHAT WILL EXONERATE TREASURERS AND OTHER PUBLIC OFFICIALS FROM PAYMENT OF MONEY ONCE IN THEIR CUSTODY.—There is some conflict of judicial opinion on the question of the legal liability of public officers for public moneys that have come into their custody, both as to the extent of such liability and as to the foundation of it. Some of the cases hold that a public officer is, as to public moneys which he receives, an insurer of their safety and liable for their loss by any means whatever, including such losses as arise by the act of God or the public enemy: *State v. Clarke*, 73 N. C. 255; *Rock v. Stinger*, 36 Ind. 348; *Commissioners of McLeod County v. Gilbert*, 19 Minn. 214; *District Township of Union v. Smith*, 39 Iowa, 9; S. C., 18 Am.

Rep. 39; *District Township of Taylor v. Morton*, 37 Id. 550; *United States v. Watts*, 1 N. Mex. 553. It was decided, however, in *Thompson v. Board of Trustees*, 30 Ill. 99, that under the Illinois statute township treasurers were insurers of public funds coming to their hands, and that nothing except the act of God or of the public enemy could relieve them from their obligation to pay over: See also *Clay County v. Simonsen*, 1 Dak. 403. And in the case of *United States v. Thomas*, 15 Wall. 337, it was decided by a majority of the court that a collector or receiver of public money, under bond to keep it safely, and pay it when required, is not bound to render the money at all events, but is excused if prevented from rendering it by the act of God or the public enemy, without any neglect or fault on his part.

GROUND OF LIABILITY.—Many decisions maintain the absolute liability of the officer, on the ground that he is the debtor, and not the bailee, of the district, township, county, state, or government whose money he receives: *Ingalls v. State*, 61 Ind. 212; *Shelton v. State*, 53 Id. 331; S. C., 21 Am. Rep. 197; *Steinback v. State*, 38 Ind. 483; *Rock v. Stinger*, 36 Id. 346; *Morbeck v. State*, 28 Id. 86; *Halbert v. State*, 22 Id. 125; *Inhabitants of Colerain v. Bell*, 9 Met. 499; *Inhabitants of Hancock v. Hazard*, 12 Cush. 112; S. C., 59 Am. Dec. 171; *Railroad National Bank v. City of Lowell*, 109 Mass. 216; *Inhabitants of Egremont v. Benjamin*, 125 Id. 19; *Agawam National Bank v. Inhabitants of South Hadley*, 128 Id. 507; *Perley v. County of Muskegon*, 32 Mich. 132; S. C., 20 Am. Rep. 637; *Inhabitants of New Providence v. McEachron*, 33 N. J. L. 339; *Muzzy v. Shattuck*, 1 Denio, 233. In New York, the year previous to the decision of *Muzzy v. Shattuck*, the case of *Supervisors of Albany County v. Dorr*, 25 Wend. 440, in which it was held that a county treasurer was not responsible for money stolen from his office without neglect or default on his part, was affirmed by an equally divided court, 7 Hill, 583, the chancellor voting for affirmance. *Muzzy v. Shattuck* was, however, unanimously affirmed by the court for the correction of errors, in December, 1846, but no opinion was published: See note in 7 Hill, 584. In the latter case it was decided, under circumstances similar to those in *Supervisors of Albany County v. Dorr*, *supra*, that a town collector was liable as a debtor. Dewey, J., in delivering the opinion of the court in *Inhabitants of Colerain v. Bell*, 9 Met. 499, said: "The specific money received by a collector in the collection of taxes is his money, and not that of the town." And in *Rock v. Stinger*, 36 Ind. 346, it was decided that the legal, technical title to the money is in the officer who has the custody of it. It was accordingly decided in *Shelton v. State*, 53 Id. 331, S. C., 21 Am. Rep. 197, that a county treasurer who had deposited public moneys in a bank was not liable to the county for the interest which he had received on the sums so deposited. But see, *contra*, *Supervisors of Richmond County v. Wandel*, 6 Laus. 33. And in *Perley v. County of Muskegon*, 32 Mich. 132, S. C., 20 Am. Rep. 637, it was held that if a county treasurer wrongfully lends money received by him as treasurer, and afterwards becomes a defaulter, the borrowers are not liable to the county in an action for money had and received. So in *Steinback v. State*, 38 Ind. 483, it was decided that where a township treasurer deposits public funds in a bank in his individual name, and overdraws his account, and uses the money so obtained to replace public funds which he has misapplied, the bank has no claim against the township.

Other authorities hold that the officer's liability is based on the terms of the official bond, which is regarded as having enlarged his liability, and make it rest on contract: *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 Id. 154; *United States v. Dashiell*, 4 Wall. 182; *United States*

v. *Keebler*, 9 Id. 83; *Boyden v. United States*, 13 Id. 17; *Bevans v. United States*, Id. 56; *District Township of Taylor v. Morton*, 37 Iowa, 550; *District Township of Union v. Smith*, 39 Id. 9; S. C., 18 Am. Rep. 39; *State v. Moore*, 74 Mo. 413; S. C., 41 Am. Rep. 322; *Commissioners of Jefferson County v. Lineberger*, 3 Mont. 231; S. C., 35 Am. Rep. 463; *Commonwealth v. Comly*, 3 Pa. St. 372; Whart. on Neg., sec. 290. Mr. Justice McLean, delivering the opinion of the supreme court of the United States in the case of *United States v. Prescott*, 3 How. 578, 587, said: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant Prescott arises out of his official bond, and principles which are founded upon public policy. . . . The condition of the bond has been broken, as the defendant Prescott failed to pay over the money received by him when required to do so; and the question is, whether he shall be exonerated from the condition of his bond on the ground that the money had been stolen from him. The objection to this defense is that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it; and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond. . . . Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense."

The reasoning of the learned justice in the extracts above quoted has been very generally approved by the courts of this country, and seems to have been accepted as satisfactory up to the time of the rendering of the decision in the case of *United States v. Thomas*, 15 Wall. 337. In *Commonwealth v. Comly*, 3 Pa. St. 374, Gibson, C. J., delivering the opinion of the court, said: "The opinion of the court in the case of the *United States v. Prescott* is founded in sound policy and sound law."

A third view is that the officer is liable as a special bailee, whose implied obligations are enlarged by the execution of his official bond, or by statute: *United States v. Thomas*, 15 Wall. 337; *Cumberland County v. Pennell*, 69 Me. 357; S. C., 31 Am. Rep. 284; *York County v. Watson*, 15 S. C. 1; S. C., 40 Am. Rep. 675. Mr. Justice Bradley, in delivering the opinion of the majority of the court in *United States v. Thomas*, 15 Wall. 347, said: "Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis.

To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same."

EXTENT OF LIABILITY.—It is generally held that where an officer executes a bond which by its terms makes his liability absolute and unconditioned, or where the statute makes it absolute, he is bound to account for all the public money he receives, even though part of it be stolen from him without his fault. It is no defense to an action on his bond that the money was stolen from him: *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 Id. 154; *United States v. Dashiell*, 4 Wall. 182; *Halbert v. State*, 22 Ind. 125; *Morbeck v. State*, 28 Id. 86; *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112; S. C., 59 Am. Dec. 171; *Commissioners of Jefferson Co. v. Lineberger*, 3 Mont. 231; S. C., 35 Am. Rep. 462; *State v. Sheldon*, 10 Neb. 452; *State v. Blair*, 76 N. C. 78; *Commonwealth v. Comly*, 3 Pa. St. 372. And even where a county provides a safe for its treasurer, and requires him to keep the public moneys in it, he and his sureties will be liable to the county for moneys stolen from such safe without any fault or negligence on his part: *Halbert v. State*, 22 Ind. 125; *Commissioners of Jefferson Co. v. Lineberger*, 3 Mont. 231; S. C., 35 Am. Rep. 462. In the case of *Ross v. Hatch*, 5 Iowa, 149, it was held that under the then existing statute of Iowa, and by the terms of the bond in that case, a county treasurer was only required to exercise reasonable diligence and care in the preservation and disposal of the public money, and that he was not liable for moneys which were stolen from the treasurer without any want of reasonable care and diligence on his part. This case was decided on the principle that the liability of public officers is determined by the terms and conditions of their official bonds, and if the officer is bound by such terms and conditions only to the exercise of reasonable diligence in the preservation of the money intrusted to him, he will not be liable for its loss if it is stolen from him without his fault: See *District Township of Taylor v. Morton*, 37 Id. 550, and *District Township of Union v. Smith*, 39 Id. 9, S. C., 18 Am. Rep. 39, where this case is cited and explained. Nor will the fact that the money was lost or destroyed by pure accident exonerate the officer or his sureties from liability on his official bond: *Clay Co. v. Simonson*, 1 Dak. 403; *District Township of Union v. Smith*, 39 Iowa, 9; S. C., 18 Am. Rep. 39. In the latter case, the moneys "had been actually destroyed by fire without want of care and diligence on his part," and yet the treasurer, who had executed an official bond conditioned to be void if he should fulfill the duties of treasurer "to the best of his ability, and according to law," was held liable to account for the moneys so destroyed. In delivering the opinion of the court in that case, Beck, J., said: "But the law holds that events against which the parties could have provided in their contract shall never be alleged as an excuse for the non-performance of obligations into which they have entered." Where an officer deposits public money in his custody in a bank, and the money is lost through the failure of the bank, the fact of such loss will not exonerate him from liability: *Inglis v. State*, 61 Ind. 212; *Lowry v. Polk Co.*, 51 Iowa, 50; S. C., 33 Am. Rep. 114; *State v. Powell*, 67 Mo. 935; S. C., 29 Am. Rep. 512; *State v. Moore*, 74 Mo. 413; S. C., 41 Am. Rep. 322; *Ward v. School District*, 10 Neb. 293; S. C., 35 Am. Rep. 477; *Havens v. Lathene*, 75 N. C. 505. Hough, J., in delivering the opinion of the court in *State v. Pocell*, *supra*, said: "Public officers, however, are universally held to a more rigorous accountability than simple trustees, for the public funds committed to their keeping; and though, in a general sense, they may be said to be bailees, still they are bailees who are subject to special obligations for the

benefit of the public, and the degree of their responsibility is not to be determined by the ordinary law of bailment." In the same case it was held that the fact that the treasurer was not guilty of any negligence in failing to ascertain the financial condition of the bank did not exonerate him from liability for the money lost by its subsequent failure. Neither does the fact that the county did not provide any safe place for the deposit of public money exonerate the county treasurer from liability for money which he deposits in a bank, where it is lost by the failure of the bank: *Lowry v. Polk Co.*, 51 Iowa, 50; S. C., 33 Am. Rep. 114. In the case of the *United States v. Keehler*, 9 Wall. 83, the facts were these: Keehler, who was postmaster at Salem, North Carolina, owed the United States a balance of three hundred and thirty dollars when the rebellion broke out. The United States at the same time owed one Clemmens upwards of three hundred dollars for postal services rendered by him in that vicinity. In August 1861 the Confederate congress passed an act appropriating balances in the hands of postmasters at the outbreak of the rebellion, to the payment of claims against the United States. Keehler, in obedience to orders from the post-office department of the Confederacy, paid the three hundred and thirty dollars to Clemmens and took his receipt. It was decided on these facts that such payment was no defense to an action on his official bond, and that no such voluntary payment was a compliance with its conditions. In the subsequent case of *Bevans v. United States*, 13 Id. 56, Bevans had been compelled by the Confederate authorities to deliver to them money belonging to the United States, which he held in his custody, but this fact was held not to be a defense to an action on his bond. In the case of *Boyd v. United States*, Id. 17, the plaintiff, who was a receiver of public moneys, was suddenly beset in his office, thrown down, bound, gagged, and against all defense that he could make, violently robbed; yet he was held not to be exonerated.

MISCELLANEOUS.—When the same person is collector of taxes for two successive years, and pays to the town the arrears of taxes collected on the tax list of the first year with the money collected on the tax list of the second year—the town not knowing whence the money came—and fails to perform the conditions of his official bond for the second year, his sureties are liable to the extent of his default, and are not entitled to deduct the amount so paid by him for taxes of the first year: *Inhabitants of Colerain v. Bell*, 9 Met. 499; *State v. Sooy*, 39 N. J. L. 539. The payment of money in the hands of a county treasurer to his successor, at the end of his term of office, can only be effectuated by the delivery of what the law of the land recognizes as money. Certificates of deposit, no money having been realized from them, are not payment, even if assented to by the successor. Nor will the treasurer be relieved thereby from liability on his official bond for failure to pay over the money found to be due from him to the county: *Cedar County v. Jenal*, 14 Neb. 254. It is the duty of a state treasurer to receive from his predecessor the moneys and securities of the state in the latter's hands, and if he accepts in lieu thereof the receipts or checks of a depositary with whom the same was left by the officer, he will be liable therefor on his official bond, in case the money is lost by the failure of such depositary: *State v. Newton*, 33 Ark. 276. In Arkansas, a collector who pays over to the treasurer what he collects in currency in county warrants is thereby relieved from official liability therefor, because the law makes such warrants a legal tender by the collector in payment of his indebtedness on account of taxes: *Askew v. Columbia County*, 32 Ark. 270; *State v. Rives*, 12 Id. 721.

Where a county treasurer receives, in payment of a judgment, county

scrip, which he pays out to the county superintendent of schools, and the latter sells it at a discount and returns the proceeds to the treasurer, the treasurer will be liable on his official bond for the amount of the discount: *Blake v. Commissioners of Johnson County*, 18 Kan. 266.

An officer who has received moneys raised by tax for a specific purpose cannot be allowed to withhold them from the object for which they were raised, and for which they were received by him, upon the ground that the local law under which they were collected was invalid: *People v. Gallup*, 65 How. Pr. 108; *First National Bank of Oxford v. Wheeler*, 72 N. Y. 201. A county treasurer is liable on his official bond for taxes collected by him upon the duplicate in his hands, although the rate of taxation exceeded that allowed by law: *Feigert v. State*, 31 Ohio St. 432. Where a town treasurer collects money *virtute officii*, though without the warrant required by the statute, he cannot be heard to deny that it is the property of the town: *Cairns v. O'Bleness*, 40 Wis. 469.

In *Commissioners of Hancock County v. Bradley*, 53 Ind. 422, it was held to be a good defense that the defendant, a county treasurer, having lost the money sued for by burglary and larceny, the board of commissioners of the county, in a settlement with him as such treasurer, allowed him the amount so lost, and ordered that he be relieved and discharged from the payment thereof, which action of the commissioners had not been appealed from, but still remained in force. But in *Supervisors of Richmond County v. Wandell*, 6 Lans. 33, it was held that boards of supervisors have no power to discharge a county treasurer from liability for not paying over moneys belonging to the county.

ACTS OF CONGRESS MODIFYING STRICT RULE OF LIABILITY.—The strict rule of liability adopted by the supreme court of the United States in *United States v. Prescott*, 3 How. 578, and applied in subsequent cases by the same court, no doubt tended to produce hardship and work injustice in some cases. And congress, in order to guard against the possible injustice which a rigid enforcement of the rule of liability adopted by the supreme court might in some cases produce, by an act approved April 29, 1864, provided "that in all cases where loyal postmasters have been robbed by Confederate forces or rebel guerrillas, of post-office stamps, stamped envelopes, or of money received and collected for, belonging to, and held for the government of the United States, and where such robbery has not been caused by the default or negligence of the postmaster, the postmaster general shall be and he is hereby authorized to credit such postmaster, in the settlement of his accounts, with the amount of which he may have been so robbed. And in cases where no such credit has been allowed, and the postmaster has been required to and has accounted for and paid over to the post-office department the sum or sums of which he may have been so robbed as aforesaid, the postmaster general is authorized to refund the same to such postmaster:" 13 Stats. at Large, 62. By the act of March 3, 1865, the provisions of the foregoing act were "extended to cases of loyal postmasters, where, by reason of the presence of armed forces, a post-office is destroyed and the postmaster loses the fixtures and furniture or postage-stamps and stamped envelopes; and also to cases where such losses are occasioned by armed forces other than those of the so-called Confederate States:" Id. 505. And by the second section of the act to extend the jurisdiction of the court of claims, approved May 9, 1865, and generally referred to as the "disbursing-officers act," it further provided "that whenever said court shall have ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer, it shall make a decree setting forth the amount thereof, upon which

the proper accounting officers of the treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts:" 14 Id. 44. To sustain an action for relief under the last of these acts, the claimant's own testimony that he was robbed is not sufficient, especially when it appears that there were disinterested parties cognizant of all the circumstances: *Pattee v. United States*, 3 Ct. of Cl. 397. This act is held to extend to the case of an officer whose chief clerk steals money from the office, if the clerk was found there by the officer when he came to assume its duties, and had borne a good reputation, and the officer exercised prudence in the care of the money and diligence in the effort to recover it: *Howell v. United States*, 7 Id. 512. The words "without fault or neglect," contained in the act, are not technical, but must be taken in their common signification. The degree of care and diligence which the act requires is that which a prudent man would exact from his agent in a like matter: *Malone v. United States*, 5 Id. 486. And in that case it was held that an officer who carries money in the way officers generally do, and it is lost, but under circumstances entirely free from suspicion, is entitled to relief under this act. But where a paymaster sent an orderly with two thousand six hundred and fifty-eight dollars, in a package to be deposited in a treasury depository, and on the way the package was stolen from or by the orderly, it was held that the paymaster was not "without fault or neglect" in the matter, and relief was denied him: *Holman v. United States*, 11 Id. 642. An officer whose clerk fraudulently raised checks, and who was compelled, in order to avoid suspension, to make good the amount, was held not to come within the provisions of this act, for he might have had recourse against the bank where he kept the money: *Hall v. United States*, 9 Id. 270.

LATE DECISIONS LIMITING STRICT RULE.—Up to the year 1872, when the supreme court of the United States decided the case of *United States v. Thomas*, 15 Wall. 337, the strict rule laid down by the same court in *United States v. Prescott*, 3 How. 578, seems to have been very generally, if not universally, applied by all the state courts where the question came up for decision. In the case of *United States v. Thomas*, *supra*, a majority of the court, justices Swayne, Miller, and Strong dissenting, decided the following propositions: 1. A collector or receiver of public money, under bond to keep it safely and pay it when required, is not bound to render the money at all events, but is excused if prevented from rendering it by the act of God or the public enemy, without any neglect or fault on his part; 2. He is a bailee of the government, and is by the common law only bound to due diligence, and only liable for negligence or dishonesty, but by the policy of the acts of congress on the subject a more stringent accountability is exacted; 3. The measure of this enhanced liability is to be found in his official bond, the performance of the condition of which can only be excused by an overruling necessity; 4. The late rebellion being a public war, the forcible seizure by the rebel authorities of public moneys in the hands of loyal government agents against their will, and without their fault or negligence, is a sufficient discharge from the obligations of their official bonds in reference to such moneys. The action was brought against the defendant and the sureties on his official bond as surveyor of the customs for the port of Nashville, Tennessee, and depository of public moneys at that place. He pleaded seizure of the moneys in question by the rebel authorities by the exercise of force which he was unable to resist, and against his will and consent, he being a loyal citizen, endeavoring faithfully to perform his duty. The questions decided squarely arose in the case, and were authoritatively determined. Of the justices who dissented,

Mr. Justice Miller only delivered an opinion. Referring to the case of *United States v. Prescott*, *supra*, and the subsequent cases approving the decision in that case, he said: "If the opinion or judgment of the court were based upon a frank overruling of those cases, and an abandonment of the doctrines on which they rest, I should acquiesce in that, though I did not in conference approve the judgment. But if the opinion of the court is to be construed as permitting those cases to stand as law, while the principles on which alone they can be defended are weakened by its argument, I must express my dissent from that view of the case. And still more strongly do I dissent from the distinction attempted to be drawn between this case and those." These words show the ground upon which the learned justice dissented from the majority opinion. In reference to the main question involved in the case, he said: "When the case of *United States v. Dashiell* came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depository beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given; the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that prior to these decisions there was any principle of public policy recognized by the courts or imposed by the law which made a depository of the public money liable for it, when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping."

Since the decision of the case of *United States v. Thomas*, 15 Wall. 337, the supreme courts of Maine and of South Carolina have had occasion to pass upon the question of the liability of a public officer for money once in his custody. In the case of *Cumberland County v. Pennell*, 69 Me. 357, S. C., 31 Am. Rep. 284, the facts were as follows: While the defendant, Pennell, who was treasurer of the county, was sitting in his office, with the door of the safe therein closed and bolted, but not locked, he was suddenly and violently beset, overpowered, and rendered senseless by robbers, who thereupon, against his will and without his fault, burglariously opened the safe and feloniously took and carried away therefrom the sum of money belonging to the county, not paid over by him at the close of his official term, and for the recovery of which the action was brought. The supreme court, on these facts, rendered this decision: "That the treasurer's degree of responsibility was simply that which the common law imposed upon him as bailee for hire; that the statute of this state did not extend or enlarge it; that his official bond does not increase his responsibility, but simply affords security for the performance of his legal obligations; that if, without fault or negligence on his part, the county treasurer is violently robbed of money belonging to the county, it is a valid defense, *pro tanto*, to an action upon his official bond; that the burden of proving such defense is upon the defendants; that evidence that the treasurer used a safe placed in the treasurer's office for his use by the county commissioners is immaterial; and that the commissioners have no authority to release a treasurer from responsibility." Virgin, J., who delivered the opinion in that case, in discussing the question from the standpoint of public policy, said: "Were the law otherwise in this state, and known to be such, faithfulness and honesty, even if they continued to be considered commendable personal qualities, would be held, if not mere abstractions, matters of secondary importance, at best, in candidates. Such qualifications, accom-

panied by the highest capability, would, in the absence of sufficient property in the principal to secure his sureties, fail to obtain them. For many a responsible person would gladly sign a bond as surety guaranteeing the faithfulness, honesty, and capacity of his neighbor, which were so potent in effecting his election to the responsible public station of county treasurer, who would long hesitate to insure the public against possible loss happening in spite of such qualities; for to insure against such a loss is not only vouching for the integrity of the officer, but practically for that of the rest of mankind that they will not rob him." The decision in *Cumberland County v. Pennell*, *supra*, was approved in the subsequent case of *Strout v. Pennell*, 74 Me. 262.

In the South Carolina case, *York County v. Watson*, 15 S. C. 1, S. C., 40 Am. Rep. 675, decided November term, 1880, the defendant had deposited the money for which he was sued on his bond, as county treasurer, in a savings bank of good standing, where it was lost by the subsequent failure of the bank. The supreme court held that he was not liable for the money so lost. Simpson, C. J., in delivering the opinion of the court, said: "Now we have no act in this state which imposes a higher or more stringent obligation upon collectors and receivers of public money than that imposed by the common law. The form of the bond, it is true, is prescribed by statute, but the only condition is, 'that the duties shall be well and truly performed.' This condition is the condition of the common law, arising from official duty, and is met at common law by an honest, faithful, prudent, and zealous discharge of duty. Should it be thought that public policy required a more stringent rule, the general assembly, in its wisdom, could easily provide the necessary enactments to that end; but it has not done so as yet, and in the absence of such statutory regulations, the court must follow the common law applicable to such cases." From these cases, it would appear that the authority of *United States v. Prescott*, 3 How. 578, which seems to have been generally accepted by the supreme courts of the states down to the time of the decision in *United States v. Thomas*, 15 Wall. 337, has been somewhat shaken by the latter case, and it is quite likely that, in those states in which the legislature has not imposed upon public officers having the custody of public moneys the rigid rule of absolute liability, the decisions hereafter rendered will be governed by the doctrine of that case.

In the case of *United States v. Humason*, 6 Saw. 199, it was decided, following *United States v. Thomas*, *supra*, that a public officer of the United States is not liable on his bond for the loss of public money, when such loss is caused by the act of God or the public enemy.

THE PRINCIPAL CASE IS CITED AND APPROVED in *Board of Education v. McLandsborough*, 36 Ohio St. 227, 231. But in that case it was held that where public money in the custody of a public officer was stolen, or otherwise lost without his fault, an act of the legislature exonerating him and the sureties on his bond, and directing a tax to meet the deficit to be levied upon the territory upon which the loss must fall, was not forbidden by the constitution of Ohio.

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CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

WILLIAMSON'S CASE.

[26 PENNSYLVANIA STATE, 2.]

WRIT OF HABEAS CORPUS WILL BE GRANTED upon *prima facie* case showing that petitioner is entitled to discharge or bail. It issues upon probable cause for discharge.

WRIT OF HABEAS CORPUS WILL BE DENIED when it appears upon the petition that applicant is legally confined, and must therefore be remanded.

WRIT OF HABEAS CORPUS WILL BE DENIED to one who admits that he is in legal custody for an offense not bailable, such as contempt, etc.

WRIT OF HABEAS CORPUS IS LIKE WRIT OF ERROR, which the court or judge is bound to allow if there be reason to suppose that an error has been committed, and equally bound to refuse if it be clear that the judgment must be affirmed. But it is not a writ of error.

ALLOWANCE OF HABEAS CORPUS BY COURT OR JUDGE IS JUDICIAL ACT, and not a ministerial one. This is true both at common law and under statutes imposing a penalty for refusal of the writ.

JUDGMENTS, EVEN OF SUBORDINATE STATE COURTS, CANNOT BE ATTACKED UPON HABEAS CORPUS, however erroneous they may be, on appeal or writ of error, where jurisdiction of the person and subject-matter has been acquired; and this principle is applicable *a fortiori* to the judgment of a federal court.

VOID JUDGMENT IS NO JUDGMENT AT ALL; AND EVERY JUDGMENT IS VOID which clearly appears on its own face to have been pronounced by a court having no jurisdiction of the person or authority over the subject-matter.

CONTEMPT OF COURT IS SPECIFIC CRIMINAL OFFENSE, and the power to punish it belongs to the court in which it was committed. No other court, not even the highest, can interfere with the exercise of this authority, either by writ of error, *mandamus*, or *habeas corpus*.

FEDERAL COURTS HAVE POWER TO TRY AND PUNISH CRIME OF CONTEMPT, and state courts will not interfere with their sentences therefor on the writ of *habeas corpus*. Such judgments are conclusive.

EVIDENCE UNDER WHICH OFFENDER WAS TRIED, FOUND GUILTY, AND SENTENCED FOR CONTEMPT of court cannot be re-examined on *habeas corpus* by another court, however innocent the petitioner may appear to be.

RECORD OF CONVICTION FOR CONTEMPT IS AS DISTINCT from the matter under investigation when it was committed as an indictment for perjury is from the cause in which the false oath was taken.

CONVICTION AND SENTENCE FOR CONTEMPT ARE NONE THE LESS CONCLUSIVE on *habeas corpus* before another tribunal because the contempt was committed while the offended court was investigating, or trying to investigate, a matter beyond its jurisdiction.

CONVICTION OF CONTEMPT IS SEPARATE PROCEEDING, AND IS CONCLUSIVE OF EVERY FACT which might have been urged on the trial for contempt; and among others, want of jurisdiction to try the cause in which the contempt was committed. Such objection must be made on the trial for contempt; it is too late to make it after conviction.

ON TRIAL FOR CONTEMPT, IT IS NO DEFENSE TO SHOW that the misconduct merely obstructed the progress of an investigation which the court would have been obliged in the end to dismiss for want of jurisdiction.

FACT ON WHICH JURISDICTION OF FEDERAL COURTS DEPENDS NEED NOT BE STATED in the process; and the want of such a statement in the body of the *habeas corpus*, or in the petition on which it was awarded, does not give respondent the right to treat it with contempt.

SENTENCE FOR INDEFINITE TIME, EVEN IF ERRONEOUS, CANNOT BE REVISED ON HABEAS CORPUS. This writ was not intended to provide a remedy against the unjust judgments or sentences of the higher courts; and when it is asked for such a purpose, it ought to be refused; unless, possibly, when it is asked from a court that may officially revise and correct the proceedings.

SLAVE CANNOT BE RESTORED TO HIS MASTER ON HABEAS CORPUS. No court is justified in issuing the writ for such a purpose. It was intended to secure the liberty of the subject, not to try the rights of property.

WRIT DE HOMINE REPLEGIANDO WAS COMMON-LAW REMEDY for trying title to a feudal villain, and this was the writ used in this country in slave cases.

HABEAS CORPUS IS SOMETIMES USED TO OBTAIN CUSTODY OF CHILDREN, but in such cases it proceeds upon the principle that the children are restrained of their liberty who are in a custody disapproved by their lawful guardians.

POSSESSION OF APPRENTICE, AS SUCH, cannot, as a general rule, be recovered on *habeas corpus*.

APPLICATION for *habeas corpus* by Passmore Williamson to the supreme court sitting in bank. The grounds upon which his application was based are briefly stated in the opinion. It appeared that John H. Wheeler was passing through Pennsylvania with certain slaves. Williamson thought they were entitled to their freedom because the master had voluntarily brought them into the state. He exerted an active influence, and succeeded in seducing the slaves away from their master's service and control.

He told them they were free, and they left their master. Wheeler obtained a *habeas corpus* from the district court of the United States to recover his slaves, and subsequently an *alias*. To this last Mr. Williamson made return that the persons named in the writ, "nor either of them, is not now, nor was at the time of the issuing of the writ, or the original writ, or at any other time, in the custody, power, or possession of the respondent, nor by him confined or restrained; wherefore he cannot have the bodies," etc. This denial that the prisoners were within his power, custody, or possession at any time whatever, in the face of credible testimony to the contrary, did not suit the court, and it was looked upon as evasive, if not false. Williamson was committed for contempt, without bail or mainprise. He then made his own application for a writ to the state court.

Gilpin and Meredith, for petitioner.

By Court, BLACK, J. This is an application by Passmore Williamson for a writ of *habeas corpus*. He complains that he is held in custody under a commitment of the district court of the United States for a contempt of that court in refusing to obey its process. The process which he is confined for disobeying was a *habeas corpus* commanding him to produce the bodies of certain colored persons claimed as slaves under the law of Virginia.

Is he entitled to the writ he has asked for? In considering what answer we shall give to this question, we are, of course, expected to be influenced, as in other cases, by the law and the constitution alone. The gentlemen who appeared as counsel for the petitioner, and who argued the motion in a manner which did them great honor, pressed upon us no considerations, except those which were founded upon their legal views of the subject.

It is argued with much earnestness, and no doubt with perfect sincerity, that we are bound to allow the writ, without stopping to consider whether the petitioner has or has not laid before us any probable cause for supposing that he is illegally detained—that every man confined in prison, except for treason or felony, is entitled to it *ex debito justitiæ*—and that we cannot refuse it without a frightful violation of the petitioner's rights, no matter how plainly it may appear on his own showing that he is held in custody for a just cause. If this be true, the case of *Ex parte Lawrence*, 5 Binn. 304, is not law. There the writ was refused, because the applicant had been previously heard

before another court. But if every man who applies for a *habeas corpus* must have it, as a matter of right, and without regard to anything but the mere fact that he demands it, then a court or a judge has no more power to refuse a second than a first application.

Is it really true that the special application which must be made for every writ of *habeas corpus*, and the examination of the commitment, which we are bound to make before it can issue, are mere hollow and unsubstantial forms? Can it be possible that the law and the courts are so completely under the control of their natural enemies that every class of offenders against the Union or the state, except traitors and felons, may be brought before us as often as they please, though we know beforehand by their own admissions that we cannot help but remand them immediately. If these questions must be answered in the affirmative, then we are compelled, against our will and contrary to our convictions of duty, to wage a constant warfare against the federal tribunals by firing off writs of *habeas corpus* upon them all the time. The punitive justice of the state would suffer still more seriously. The half of the western penitentiary would be before us at Philadelphia, and a similar proportion from Cherry Hill and Moyamensing would attend our sittings at Pittsburgh. To remand them would do very little good; for a new set of writs would bring them all back again. A sentence to solitary confinement would be a sentence that the convict should travel or a limited term up and down the state in company with the officers who might have him in charge. By the same means the inmates of the lunatic asylums might be temporarily enlarged, much to their own detriment; and every soldier or seaman in the service of the country could compel their commanders to bring them before the court six times a week.

But the *habeas corpus* act has never received such a construction. It is a writ of right, and may not be refused to one who shows a *prima facie* case entitling him to be discharged or bailed. But he has no right to demand it who admits that he is in legal custody for an offense not bailable; and he does make what is equivalent to such an admission when his own application and the commitment referred to in it show that he is lawfully detained. A complaint must be made, and the cause of detainer submitted to a judge, before the writ can go. The very object and purpose of this is to prevent it from being trifled with by those who have manifestly no right to be set at liberty. It is like a writ of error in a criminal case, which the court or judge

is bound to allow if there be reason to suppose that an error has been committed, and equally bound to refuse if it be clear that the judgment must be affirmed.

We are not aware that any application to this court for a writ of *habeas corpus* has ever been successful where the judges, at the time of the allowance, were satisfied that the prisoner must be remanded. The petitioner's counsel say there is but one reported case in which it was refused, and this fact is given in the argument as a reason for supposing that in all other cases the writ was issued without examination. But no such inference can fairly be drawn from the scarcity of judicial decisions on a point like this. We do not expect to find in reports so recent as ours those long-established rules of law, which the student learns from his elementary books, and which are constantly acted upon without being disputed.

The *habeas corpus* is a common-law writ, and has been used in England from time immemorial, just as it is now. The statute of 31 Car. II., c. 2, made no alteration in the practice of the courts in granting these writs: *Rex v. Hobhouse*, 3 Barn. & Ald. 420; S. C., 2 Chit. Rep. 207. It merely provided that the judges in vacation should have the power which the courts had previously exercised in term time: 1 Chit. G. P. 586; and inflicted penalties upon those who should defeat its operation. The common law upon this subject was brought to America by the colonists; and most if not all the states have since enacted laws resembling the English statute of Charles II. in every principal feature. The constitution of the United States declares that "the privilege of a writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it." Congress has conferred upon the federal judges the power to issue such writs, according to the principles and rules regulating it in other courts. Seeing that the same general principles of common law on this subject prevail in England and America, and seeing also the similarity of their statutory regulations in both countries, the decisions of the English judges as well as of the American courts, both state and federal, are entitled to our fullest respect as settling and defining our powers and duties.

Blackstone, 3 Com. 132, says that the writ of *habeas corpus* should be allowed only when the court or judge is satisfied that the party hath probable cause to be delivered. He gives cogent reasons why it should not be allowed in any other case, and cites with unqualified approbation the precedent set by Sir

Edward Coke and Chief Justice Vaughan in cases where they had refused it. Chitty lays down the same rule: 1 Crim. L. 101; 1 Chit. G. P. 686, 687. It seems to have been acted upon by all the judges. The writ was refused in *Rex v. Schiever*, 2 Burr. 765, and in the case of the *Three Spanish Sailors*, 2 W. Black. 1324. In *Rex v. Hobhouse*, 3 Barn. & Ald. 420, it was fully settled by a unanimous court, as the true construction of the statute, that the writ is never to be allowed if upon view of the commitment it be manifest that the prisoner must be remanded. In New York, when the statute in force there was precisely like ours (so far, I mean, as this question is concerned), it was decided by the supreme court, *Yates v. Lansing*, 5 Johns. 282, that the allowance of the writ was a matter within the discretion of the court, depending on the grounds laid in the application. It was refused in *Husted's Case*, 1 Johns. Cas. 136, and in *Ex parte Ferguson*, 9 Johns. 139. In addition to this, we have the opinion of Chief Justice Marshall, in *Watkin's Case*, 3 Pet. 202, that the writ ought not to be awarded if the court is satisfied that the prisoner must be remanded. It was accordingly refused by the supreme court of the United States in that case, as it had been before in *Kearney's Case*, 7 Wheat. 38.

On the whole, we are thoroughly satisfied that our duty requires us to view and examine the cause of detainer now, and to make an end of the business at once, if it appears that we have no power to discharge him on the return of the writ.

The prisoner, as already said, is confined on a sentence of the district court of the United States for a contempt. A *habeas corpus* is not a writ of error. It cannot bring a case before us in such a manner that we can exercise any kind of appellate jurisdiction in it. On a *habeas corpus*, the judgment even of a subordinate state court cannot be disregarded, reversed, or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to reverse it if it were before us on appeal or writ of error. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until it is regularly brought up for revision. We decided this three years ago at Sunbury, in a case which we all thought one of much hardship. But the rule is so familiar, so universally acknowledged, and so reasonable in itself, that it requires only to be stated. It applies with still greater force, or at least for much stronger reasons, to the decisions of the federal courts. Over them we have no control at all, under any cir-

cumstances, or by any process that could be devised. Those tribunals belong to a different judicial system from ours. They administer a different code of laws, and are responsible to a different sovereignty. The district court of the United States is as independent of us as we are of it—as independent as the supreme court of the United States is of either. What the law and the constitution have forbidden us to do directly on writ of error, we, of course, cannot do indirectly by *habeas corpus*.

But the petitioner's counsel have put his case on the ground that the whole proceeding against him in the district court was *coram non judge*, null and void. It is certainly true that a void judgment may be regarded as no judgment at all; and every judgment is void which clearly appears on its own face to have been pronounced by a court having no jurisdiction or authority in the subject-matter. For instance, if a federal court should convict and sentence a citizen for libel; or if a state court, having no jurisdiction except in civil pleas, should try an indictment for a crime and convict the party—in these cases the judgments would be wholly void. If the petitioner can bring himself within these principles, then there is no judgment against him; he is wrongfully imprisoned, and we must order him to be brought out and discharged.

What is he detained for? The answer is easy and simple. The commitment shows that he was tried, found guilty, and sentenced for contempt of court, and nothing else. He is now confined in execution of that sentence, and for no other cause. This was a distinct and substantive offense against the authority and government of the United States. Does anybody doubt the jurisdiction of the district court to punish contempt? Certainly not. All courts have this power, and must necessarily have it; otherwise they could not protect themselves from insult, or enforce obedience to their process. Without it they would be utterly powerless. The authority to deal with an offender of this class belongs exclusively to the court in which the offense is committed; and no other court, not even the highest, can interfere with its exercise, either by writ of error, *mandamus*, or *habeas corpus*. If the power be abused, there is no remedy but impeachment. The law was so held by this court in *McLaughlin's Case*, 5 Watts & S. 276; and by the supreme court of the United States in *Kearney's Case*, 7 Wheat. 38. It was solemnly settled as part of the common law in *Brass Crosby's Case*, 3 Wils. 183, by a court in which sat two of the foremost jurists that England ever produced. We have

not the smallest doubt that it is the law, and we must administer it as we find it. The only attempt ever made to disregard it was by a New York judge, *Yates' Case*, 4 Johns. 345, who was not supported by his brethren. This attempt was followed by all the evil and confusion which Blackstone and Kent and Story declared to be its necessary consequences. Whoever will trace that singular controversy to its termination will see that the chancellor and the majority of the supreme court, though once outvoted in the senate, were never answered. The senate itself yielded to the force of the truths which the supreme court had laid down so clearly, and the judgment of the court of errors in *Yates' Case*, 6 Johns. 503, was overruled by the same court the year afterward, in *Yates v. Lansing*, 9 Id. 423 [6 Am. Dec. 290], which grew out of the very same transaction, and depended on the same principles. Still further reflection at a later period induced the senate to join the popular branch of the legislature in passing a statute which effectually prevents one judge from interfering by a *habeas corpus* with the judgment of another on a question of contempt.

These principles being settled, it follows irresistibly that the district court of the United States had power and jurisdiction to decide what acts constitute a contempt against it; to determine whether the petitioner had been guilty of contempt, and to inflict upon him the punishment which, in its opinion, he ought to suffer. If we fully believed the petitioner to be innocent—if we were sure that the court which convicted him misunderstood the facts or misapplied the law—still we could not re-examine the evidence, or rejudge the justice of the case, without grossly disregarding what we know to be the law of the land. The judge of the district court decided the question on his own constitutional responsibility. Even if he could be shown to have acted tyrannically or corruptly, he could be called to answer for it only in the senate of the United States.

But the counsel of the petitioner go behind the proceedings in which he was convicted, and argue that the sentence for contempt is void because the court had no jurisdiction of a certain other matter which it was investigating, or attempting to investigate, when the contempt was committed. We find a judgment against him in one case; and he complains about another, in which there is no judgment. He is suffering for an offense against the United States; and he says he is innocent of any wrong to a particular individual. He is conclusively adjudged guilty of contempt; and he tells us that the court has no jurisdiction to restore Mr. Wheeler's slaves.

It must be remembered that contempt of court is a specific criminal offense. It is punished sometimes by indictment and sometimes in a summary proceeding, as it was in this case. In either mode of trial, the adjudication against the offender is a conviction, and the commitment in consequence is execution: *Kearney's Case*, 7 Wheat. 38. This is well settled, and I believe has never been doubted. Certainly the learned counsel for the petitioner have not denied it. The contempt may be connected with some particular cause, or it may consist in misbehavior, which has a tendency to obstruct the administration of justice generally. When it is committed in a pending cause, the proceeding to punish it is a proceeding by itself. It is not entitled in the cause pending, but on the criminal side: *Ex parte Milligan*, 4 Wall. 134. The record of a conviction for contempt is as distinct from the matter under investigation, when it was committed, as an indictment for perjury is from the cause in which the false oath was taken. Can a person convicted of perjury ask us to deliver him from the penitentiary, on showing that the oath on which the perjury is assigned was taken in a cause of which the court had no jurisdiction? Would any judge in the commonwealth listen to such a reason for treating the sentence as void? If, instead of swearing falsely, he refuses to be sworn at all, and he is convicted, not of perjury, but of contempt, the same rule applies, and with a force precisely equal. If it be really true that no contempt can be committed against a court while it is inquiring into a matter beyond its jurisdiction, and if the fact was so in this case, then the petitioner had a good defense; and he ought to have made it on his trial. To make it after conviction is too late. To make it here is to produce it before the wrong tribunal.

Every judgment must be conclusive until reversed. Such is the character, nature, and essence of all judgments. If it be not conclusive, it is not a judgment. A court must either have power to settle a given question finally and forever, so as to preclude any further inquiry upon it, or else it has no power to make any decision at all. To say that a court may determine a matter, and that another court may regard the same matter afterwards, as open and undetermined, is an absurdity in terms.

It is most especially necessary that convictions for contempt in one court should be final, conclusive, and free from re-examination by other courts on *habeas corpus*. If the law were not so, our judicial system would break to pieces in a month. Courts totally unconnected with each other would be coming in

constant collision. The inferior courts would revise all the decisions of the judges placed over and above them. A party, unwilling to be tried in this court, need only defy our authority, and if we commit him, to take out his *habeas corpus* before an inferior judge of his own choosing, and if that judge is of opinion that we ought not to try him, there is an end of the case.

This doctrine is so plainly against the reason of the thing that it would be wonderful indeed if any authority for it could be found in the books. There is none except the overruled decision of Mr. Justice Spencer of New York, already referred to, and some efforts of the same kind to control the other courts, made by Sir Edward Coke, in the king's bench, which are now universally admitted to have been illegal, as well as rude and intemperate. On the other hand, we have all the English judges and all our own declaring their want of power to interfere with or control one another in this way. I will content myself by simply referring to some of the books in which it is established that the conviction of contempt is a separate proceeding, and is conclusive of every fact which might have been urged on the trial for contempt, and among others, want of jurisdiction to try the cause in which the contempt was committed: *Yates' Case*, 4 Johns. 325 et seq.; the opinion of Chief Justice Kent on pages 370-375; *Yates v. People*, 6 Id. 503; *Yates v. Lansing*, 9 Id. 423 [6 Am. Dec. 290]; *People v. Nevins*, 1 Hill (N. Y.), 170; *State v. Woodfin*, 5 Ired. L. 199 [42 Am. Dec. 161]; *Ex parte Summers*, Id. 153; *Matter of Smethurst*, 2 Sandf. 724; *Lockwood v. State*, 1 Ind. 161; *State v. Tipton*, 1 Blackf. 166; *State v. Johnson*, 25 Miss. 836; *Commonwealth v. Deacon*, 2 Wheeler's Crim. Cas. 1; *Matter of Dimes*, 14 Ad. & El., N. S., 558. These cases will speak for themselves, but I may remark as to the last one, that the very same objection was made there and here. The party was convicted of contempt in not obeying a decree. He claimed his discharge on *habeas corpus* because the chancellor had no jurisdiction to make the decree, being interested in the cause himself. But the court of queen's bench held that if that was a defense it should have been made on the trial for contempt, and the conviction was conclusive. We cannot choose but hold the same rule here. Any other would be a violation of the law which is established and sustained by all authority and all reason.

But certainly the want of jurisdiction alleged in this case would not even have been a defense on the trial. The proposition that a court is powerless to punish for disorderly conduct

or disobedience of its process in a case, which it ought ultimately to dismiss for want of jurisdiction, is not only unsupported by judicial authority, but we think it is new even as an argument at the bar. We ourselves have heard many cases through and through before we became convinced that it was our duty to remit the parties to another tribunal. But we never thought that our process could be defied in such cases more than in others.

There are some proceedings in which the want of jurisdiction would be seen at the first blush; but there are others in which the court must inquire into all the facts before it can possibly know whether it has jurisdiction or not. Any one who obstructs or baffles a judicial investigation for that purpose is unquestionably guilty of a crime for which he may and ought to be tried, convicted, and punished. Suppose a local action to be brought in the wrong county: this is a defense to the action, but a defense which must be made out like any other. While it is pending, neither a party nor an officer, nor any other person, can safely insult the court, or resist its order. The court may not have power to decide upon the merits of the case; but it has undoubted power to try whether the wrong was done within its jurisdiction or not. Suppose Mr. Williamson to be called before the circuit court of the United States as a witness in a trial for murder, alleged to be committed on the high seas. Can he refuse to be sworn, and at his trial for contempt justify himself on the ground that the murder was in fact committed within the limits of a state, and therefore triable only in a state court? If he can, he can justify perjury for the same reason. But such a defense for either crime has never been heard of since the beginning of the world. Much less can it be shown, after conviction, as a ground for declaring the sentence void.

The writ which the petitioner is convicted of disobeying was legal on its face. It enjoined upon him a simple duty, which he ought to have understood and performed without hesitation. That he did not do so is a fact conclusively established by the adjudication which the court made upon it. I say the writ was legal because the act of congress gives to all the courts of the United States the power "to issue writs of *habeas corpus* when necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law."

Chief Justice Marshall decided, in Burr's trial, that the principles and usages referred to in this act were those of the common law. A part of the jurisdiction of the district court consists in restoring fugitive slaves; and the *habeas corpus* may be

used in aid of it when necessary. It was awarded here upon the application of a person who complained that his slaves were detained from him. Unless they were fugitive slaves, they could not be slaves at all, according to the petitioner's own doctrine, and if the judge took that view of the subject, he was bound to award the writ. If the persons mentioned on it had turned out on the hearing to be fugitives from labor, the duty of the district judge to restore them, or his power to bring them before him on a *habeas corpus*, would have been disputed by none except the very few who think that the constitution and law on that subject ought not to be obeyed. The duty of the court to inquire into the facts on which its jurisdiction depends is as plain as its duty not to exceed it when it is ascertained. But Mr. Williamson stopped the investigation *in limine*; and the consequence is, that everything in the case remains unsettled. Whether the persons named in the writ were slaves or free, whether Mr. Wheeler was the owner of them, whether they were unlawfully taken from him, whether the court had jurisdiction to restore them—all these points are left open for want of a proper return. It is not our business to say how they ought to be decided; but we do not doubt that the learned and upright magistrate who presides in the district court would have decided them as rightly as any judge in all the country. Mr. Williamson had no right to arrest the inquiry because he supposed that an error would be committed on the question of jurisdiction, or any other question. If the assertions which his counsel now make on the law and the facts be correct, he prevented an adjudication in favor of his proteges, and thus did them a wrong which is probably a greater offense in his own eyes than anything he could do against Mr. Wheeler's rights. There is no reason to believe that any trouble whatever would have come out of the case if he had made a true, full, and special return of all the facts; for then the rights of all parties, black and white, could have been settled, or the matter dismissed for want of jurisdiction, if the law so required.

It is argued that the court had no jurisdiction, because it was not averred that the slaves were fugitives, but merely that they owed service by the laws of Virginia. Conceding for the argument's sake that this was the only ground on which the court could have interfered—conceding also that it is not substantially alleged in the petition of Mr. Wheeler—the proceeding was, nevertheless, not void for that reason.

The federal tribunals, though courts of limited jurisdiction,

are not inferior courts. Their judgment, until reversed by the proper appellate court, are valid and conclusive upon the parties, though the jurisdiction be not alleged in the pleadings, nor in any part of the record: *McCormick v. Sullivan*, 10 Wheat. 192. Even if this were not settled and clear law, it would still be certain that the fact on which jurisdiction depends need not be stated in the process. The want of such a statement in the body of the *habeas corpus*, or in the petition on which it was awarded, did not give Mr. Williamson a right to treat it with contempt. If it did, then the courts of the United States must set out the ground of their jurisdiction in every subpoena for a witness; and a defective or untrue averment will authorize the witness to be as contumacious as he sees fit.

But all that was said in the argument about the petition, the writ, and the facts which were proved, or could be proved, refers to the evidence on which the conviction took place. This has passed *in rem judicatam*. We cannot go one step behind the conviction itself. We could not reverse it if there had been no evidence at all. We have no more authority in law to come between the prisoner and the court, to free him from a sentence like this, than we would have to countermand an order issued by the commander-in-chief of the United States army. We have no authority, jurisdiction, or power to decide anything here except the simple fact that the district court had power to punish for contempt a person who disobeys its process, that the petitioner is convicted of such contempt, and that the conviction is conclusive upon us. The jurisdiction of the court on the case which had been before it, and everything else which preceded the conviction, are out of our reach, and they are not examinable by us, and of course not now intended to be decided.

There may be cases in which we ought to check usurpation of power by the federal courts. If one of them should presume, upon any pretense whatever, to take out of our hands a prisoner convicted of contempt in this court, we would resist it by all proper and legal means. What we would not permit them to do against us we will not do against them. We must maintain the rights of the state and its courts; for to them alone can the people look for a competent administration of their domestic concerns; but we will do nothing to impair the constitutional vigor of the general government, which is "the sheet-anchor of our peace at home and our safety abroad."

Some complaint was made in the argument about the sentence being for an indefinite time. If this were erroneous, it would not

avail here; since we have as little power to revise the judgment for that reason as for any other. But it is not illegal, nor contrary to the usual rule in such cases. It means commitment until the party shall make proper submission: *Regina v. Paty*, 3 *Ld. Raym.* 1108; *Yates' Case*, 4 *Johns.* 375. The law will not bargain with anybody to let its courts be defied for a specified term of imprisonment. There are many persons who would gladly purchase the honors of martyrdom in a popular cause at almost any given price, while others are deterred by a mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive, and not too severe upon the refractory. The petitioner, therefore, carries the key of his prison in his own pocket. He can come out when he will by making terms with the court that sent him there. But if he chooses to struggle for a triumph—if nothing will content him but a clean victory or a clean defeat—he cannot expect us to aid him. Our duties are of a widely different kind. They consist in discouraging, as much as in us lies, all such contests with the legal authorities of the country.

LOWRIE, J. I have not been able to doubt that this court is, in many cases, bound to exercise its judgment as to the propriety of granting the writ before allowing it to issue. Notwithstanding the words of the act which imposes a penalty for refusing the writ, we are not forbidden to interpret the law; and the necessity of presenting a petition to the court or to a judge thereof; of stating therein whether the prisoner was detained on criminal or on civil process, or neither; of producing the warrant of committal, or accounting for not doing so; and the fact that traitors and murderers, and fugitives from the justice of other states, are excluded from the benefit of the act; and that the writ was not intended for the relief of convict criminals: *Chamber's Case*, *Cro. Car.* 168; *Bracy's Case*, 1 *Salk.* 348; and was not extended to them by our act;—all these matters show plainly enough that the judge or court is not exercising a mere ministerial function in granting the writ. On any other supposition, there is no reason at all for applying to the court, for the prothonotary could grant it as well.

And no one can examine the provisions of *Magna Charta*; the petition of right: 3 *Car. I.*; the statute repealing the star-chamber court: 16 *Car. I.*, c. 10; the *habeas corpus* act of 31 *Car. II.*, and ours of 1785; and the numerous kindred statutes to which that investigation will lead him—without perceiving that a free and open court, and a full and open trial before the superior

judges, by due course of law, have always been regarded as the best guaranty of the liberty of the citizen. He will see, moreover, very plainly that the *habeas corpus* is only a means by which this end is to be secured, so that no ignorance or tyranny of king, or king's counsel, or minister, or of mere local and inferior courts, dependent on and governed by local customs, or of justices of the peace, shall imprison a man without a chance of bail or a hope of obtaining a speedy trial by the law of the land: See *Commonwealth v. Sheriff*, 7 Watts & S. 108.

The *habeas corpus* was not intended, and could not be intended, to authorize the superior judges, being substantially those of the higher courts of record, to interfere with the jurisdiction of each other. The purpose of the writ was satisfied when the jurisdiction of the superior courts attached, for the state could not know any better means of securing a fair and impartial trial. If that, with the ordinary provisions for the correction of errors, was not sufficient, then humanity has only to acknowledge its incapacity to provide entirely against error and injustice. Certainly the *habeas corpus* was not intended to provide a remedy against the unjust judgments or sentences of the higher courts; and when it is asked for for such a purpose, it ought to be refused, unless, possibly, when it is asked from a court that may officially revise and correct the proceedings: *Ex parte Watkins*, 7 Pet. 572; *R. C.'s Case*, Cro. Car. 175; *Bushell's Case*, 1 Mod. 119; *Dime's Case*, 14 Ad. & El., N. S., 566; *Ex parte Cobbett*, 5 Com. B. 418; *Ex parte Jenkins*, 1 Barn. & Cress. 655; *Hummel and Bishoff's Case*, 9 Watts, 416.

But even if our *habeas corpus* act of 1785 did mean to say that the writ shall always be granted when prayed for, it could not be obeyed so far as to conflict with the new order of things introduced in 1789 by the constitution of the United States. Hence originated other and independent jurisdictions, with which our *habeas corpus* act was not intended to interfere; for when it was passed, it could have no reference to them. How far it can be used in paralyzing those jurisdictions, or subjecting them to those of the states, is proper matter to be decided on the presentation of the petition, or on the return of the writ, as the court may think proper. We saw such difficulties as led us to hear an argument from the petitioner's counsel on the presentation of the petition, and still our difficulties have not been removed.

But I have a very strong impression that no court is justified in issuing a *habeas corpus* for the purpose of restoring a slave to

his master; and that is very plainly the purpose for which the writ was issued out of the district court. I do not think that our writ has any such purpose, or ever had. It was intended to secure the liberty of the subject, and not to try rights of property. It is sometimes used to obtain the custody of children, but then it proceeds upon the principle that children are restrained of their liberty who are in a custody that is disapproved by their lawful guardians. Arrived at years of discretion, the writ is not used to retain them in an unwilling subjection. It is not usually allowed in order to recover the possession of an apprentice as such: *Ex parte Landsdown*, 5 East, 38; *Rex v. Reynolds*, 6 T. R. 497; *Rex v. Despard*, 7 Id. 741; *Commonwealth v. Harrison*, 11 Mass. 63.

The common law of England, as it was when Pennsylvania was settled, could not have allowed a *habeas corpus* for the purpose of enforcing slavery; for it did not recognize such an institution. The common-law remedy for trying the title to a feudal villain was the writ *de homine replegiando*, and that was the writ used by us in slave cases: *Cowperthwaite v. Jones*, 2 Dall. 56; *Jack v. Eales*, 3 Binn. 101; *Wilson v. Belinda*, 3 Serg. & R. 396; *Alexander v. Stokely*, 7 Id. 299. And this application of the *habeas corpus* is to my mind seriously startling.

I have, moreover, a very strong impression that there is no way in which the case before the district judge can be regarded that would entitle the federal judiciary to take cognizance of it; but I will not trouble any one with my reasons for this.

Regarding the matter thus, it seemed to me that there was real merit in the claim that the petitioner should be discharged; and I did not see any very satisfactory reason in opposition to our hearing and deciding the case; and therefore I was at first willing to grant the writ and hear the other side. I was very strongly impressed by the argument that the district judge exceeded his authority in entertaining the case; and that the supreme court of the state has power on a *habeas corpus* to discharge the prisoner; especially considering that this court is one of general jurisdiction and part of a government of general powers, whereas the district court belongs to a government of limited powers, and necessarily partakes of the same character. But this proposition involves consequences so grave in theory at least, and principles so essential to political order, that it ought not to be readily admitted.

We may first set aside the consideration that the federal courts are of limited jurisdiction; for even conceding that they

are, it does not follow that we may review and restrain them in the exercise of it. To use this as a reason for treating their acts as void, when we think them unauthorized, is to apply an English reason to an American institution, without any resemblances sufficient to make the application legitimate. The English superior courts might have had very good reasons for treating all the unauthorized acts of their inferior tribunals as void, in order to keep them within their proper limits. But we cannot so treat the United States courts; for, in the English sense, they too are superior courts, and especially they are not subordinate to us.

The proposition, then, remains, that whenever any of the public tribunals of the United States exceed the jurisdiction which, under the constitution, can be given to them, and in doing so a citizen is arrested or imprisoned, then our *habeas corpus* is a proper and effectual remedy.

If this is so, then certainly there are places where the courts of the United States can have but little power for any purpose. Any man, arrested or imprisoned by warrant or execution, or sentence from district, circuit, or supreme courts, or either house of congress, may have relief from any friendly county judge wielding the power of the *habeas corpus*. A judge impeached, convicted, and sentenced, a traitor tried and condemned, may still have hope from the *habeas corpus*, if a judge can be found ignorant or insubordinate or degraded enough to declare that his superiors acted without jurisdiction.

And since the force of the argument does not at all depend upon any peculiar virtue in the *habeas corpus*, but simply on the supposed want of jurisdiction in the federal tribunals, we may apply it to all cases. Then we may have summary replevins and ejectments, and prohibitions and injunctions, and attachments to support them, heard and decided by single judges, or even commissioners or justices of the peace, everywhere and without review, for the purpose of testing the validity of the judgments of the United States tribunals; and the constitutionality of federal tax laws and tariffs, and the frustration of disagreeable laws, become perfectly simple and regular.

And if we should do this in any honest belief in its political rightness, we should, of course, be willing to have the same principle applied in reference to our own official system. Then *habeas corpus* would stand as a writ designed to set aside all official order, and to place single judges above the very tribunals of which they are members: See *Commonwealth v. Lecky*, 1 Watts, 67 [26 Am. Dec. 37].

On one occasion the laws of the United States were attempted to be thus summarily set aside, and to prevent it the force bill (March 2, 1833, sec. 7, Pamph. Laws, 54) declared that *habeas corpus* out of the United States courts shall relieve any person confined by any authority for acts done in pursuance of any order or decree of a United States court. This is not a strange way of protecting one court against the encroachments of another: *Bruistone and Baker's Case*, 1 Rolle, 315; 2 Ch. Gen. Pr. 317; 1 Mad. Ch. Pr. 135. And it is certainly most effectual, for it would protect the marshal in disobeying an order by us to discharge the prisoner; and thus it very plainly forbids us to discharge him. If in this law there is any encroachment upon state rights, it is no more than might have been expected at the time; for the cause of freedom always suffers from the restrictions that become necessary in order to suppress disorder, whether that disorder arises from mere vice or from an over-zealous urging of principles and institutions that are supposed to be good.

If it be meant that the supreme court has a peculiar authority to interfere in such cases, I have failed to discover whence it arises. The *habeas corpus* act makes no distinction between the different courts and judges who may exercise the powers given, and I do not see how we can make any, except that which is necessarily involved in the principle of subordination.

All the institutions of the same government, however complex, are intended to be in harmony with each other, and unitedly to aid in the preservation of order. It is therefore the duty of all public officers to avoid, if possible, all conflict of functions in the execution of their offices, and to follow the principles that provide for this result. The most obvious of these is, that co-ordinate tribunals cannot interfere with each other, nor inferior with superior ones. Without this rule, government would be a mere mob of officials, wanting an essential element of unity, and would soon fall to pieces. Without this, the *habeas corpus* law would set aside all order, by allowing the lowest of all subordinate judges to annul, on constitutional grounds, the judgments of every court in the state, even the very highest; and such apparently gross insubordination would be a mere error in judgment, and not an impeachable offense.

The supreme court of the state is in no sense the official superior of any of the United States courts, but co-ordinate with them all. We are not set as checks upon each other, and cannot directly review each other's decisions in any matter. Each

of us occupies a different position in our compound system of government, and each of us must answer to our official or political superiors. This court is not set to watch over the federal courts and suspect them of excess of jurisdiction; and we should be ourselves disorderly if we should assume any control over them, set as co-ordinate tribunals upon an entirely separate foundation. No one will pretend that our writ of prohibition would be of any value there, and hence it is plain that we cannot interfere without disorder.

Like most other writs, *habeas corpus* must be more efficacious in the hands of a superior court than of any subordinate one; for the law of order requires that those who are officially equal shall not sit in review of each other's acts. The cases that illustrate this are very numerous, declaring that the superior courts of law and equity cannot interfere with each other; that the regular courts cannot interfere with the sentences for contempt and breach of privilege by the senate or house of representatives, house of lords or house of commons. Where the duty of final decision and the whole control of any matter is given to one set of officers, the interference of others is mere usurpation. And here I may remark that a sentence for contempt is not essentially different from any other judgment, decree, or sentence. It is a matter adjudicated, and it belongs to the very essence of governmental order that it cannot be reviewed except by the court that pronounced it or by its official superiors, and therefore, in this instance, not by us.

It is insisted that this sentence, being in excess of authority, is void, and we are asked to declare it so. Without stopping to notice the habitual misapplication of this word "void" to all acts of public authority which are made the subject of an opposing criticism, I may say that it is a plain solicism thus to qualify any act that is so efficient of results. A sentence by which a man is committed to prison and held there cannot be void. If we wish to treat the subject profitably, we must speak of it more accurately.

Is it meant to say that we must, on *habeas corpus*, inquire whether a court, legitimately established, has rightly decided the question of its jurisdiction. Substantially, this is the same objection that we have already considered. If it is well-founded, then it applies to all sorts of cases; for the question of jurisdiction is involved in them all; every judgment rendered is an assertion of the jurisdiction of the court that renders it. If the allegation of want of jurisdiction entitles us to review it,

then there are but few cases in the federal courts that are beyond the interference of the state courts, if a defendant desires to have it.

The superior courts in England may treat as void the unauthorized acts of their inferiors, and be justified by the peculiarities of their system and the fact of their superiority; but they could not, with propriety, so treat each other. Their practice relative to each other never contained such an element of disorder. A party summoned to answer is bound to obey, or give a good reason for not doing so. He cannot treat public authority with contempt. If he thinks that the court lacks jurisdiction, a decent respect for public order requires him to appear and raise the question, so that it may be decided in an orderly way. He need not raise it in order to insure his right to the objection in a court of error; but it may be necessary in order to stop the unauthorized process. Judges cannot keep all the law in their minds, and parties are heard in order that they may insist upon every principle that is in their favor. It would be very disorderly for defendants to hold back an objection to the jurisdiction of the court, and then raise it by rebellion against the public authorities, when the writ of the commonwealth comes to be executed; and *habeas corpus* would be a most disorderly writ if it could be thus used in contempt of authority.

Government consists of fallible men, who do not always know their duty; and parties may lose some of their rights, if they do not aid the public officers by notifying them of their views, and urging them; and questions of jurisdiction are very often as difficult to decide as any other. It is an essential element of judicial authority that it must be the judge of its own jurisdiction; and I do not know that this rule is peculiarly applicable to the higher courts. The lowest must act upon it, subject to the higher social law that is involved in official subordination. Often the question may be erroneously decided. Often such decisions may result in great injury to the citizen; but it is the lot of government to err, because it is human; and a man of well-trained mind will think it no great hardship to submit to authority even in error. In the name of order, the country demands and has the right to demand it.

It is usual to say, even of foreign judgments, that if pronounced by a competent tribunal, and carried into effect without our assistance, they are conclusive of the question decided. And here, "competent tribunal" means one of the regularly established courts of the country and in it. If its government

could, according to the law of nations, have jurisdiction of such a case, we concede to the court itself to decide upon its own jurisdiction: *Rose v. Himely*, 4 Cranch, 276; *Ripple v. Ripple*, 1 Rawle, 389; for we are not interested in the manner in which other states distribute their civil functions among their different departments.

Applying this principle here, our interference is certainly excluded. Not that the United States is a foreign country, but that its courts belong to a different system from the state courts, and thus these respective authorities are, as authorities, foreign to each other. Each must respond to its own superiors; neither can call the other officially to account. I speak not here of the action for damages for excess of authority. True enough, we do thus leave the federal government at liberty to make continual encroachments upon state rights without being responsible therefor to any organized power, but this cannot be avoided; there can be no organized authority superior to government itself. However we may define its functions, itself must interpret them, subject only to the right of the people to give new instructions. It must be so with every government. Manufacture and repair constitutions and bills of right as we may, multiply checks and restrictions upon official functions as we may, we cannot shut out human error and its consequences, which are sometimes distressing; while we may carry our suspicions of government so far as to take away its real efficiency as a means of preserving social order; and then we shall reject it as perfectly worthless, and the circumstances of its rejection must give the form to its successor.

In civil matters there can be no moral principle of higher importance than the one that is most deeply involved in this case—the principle of social order. It is a principle of action that is as binding on the conscience as any other. It is the great moral principle of social man. Without it we must endanger and retard our social progress. Without it we confound all official subordination, and infect with disease the very organs of social life. This principle expresses itself, as best it can, in our civil institutions; and thus originating, they are morally entitled to our respect and obedience, imperfect as we may suppose them to be. He that rejects this principle from his moral code, or gives it a low place there, can hardly be an orderly citizen; but must be dangerous to the public peace and progress in proportion as he is otherwise intelligent, influential, and active. If the supreme court, as the higher

impersonation of the judicial order of the state, should set aside this principle, there can be no guaranty for the healthy administration of our social system. In the name of the order which we represent and enforce, I decline any and every usurpation of power or control over the United States judiciary; it being a system collateral to ours, as complete and efficient in its organization, and as legitimate and final an authority as any other. I concur in refusing the writ.

KNOX, J., dissented.

HABEAS CORPUS IS REMEDY FOR EVERY ILLEGAL IMPRISONMENT: See *Commonwealth v. Lecky*, 26 Am. Dec. 37, and exhaustive note thereto 40, as to the extent to which a court can go behind judgment or process on *habeas corpus*.

JURISDICTION MAY BE INQUIRED INTO ON HABEAS CORPUS: *Commonwealth v. Lecky*, 26 Am. Dec. 41, note; Rapalje on Contempts, sec. 155.

CONFLICT OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS: *State v. Dimick*, 37 Am. Dec. 197, and extensive note thereto 200, on the authority of a state court on *habeas corpus*; extended note to *People v. McLeod*, 37 Id. 363; Church on Habeas Corpus, secs. 78-86, 132, 228; Rapalje on Contempts, sec. 159.

ASSAILING JUDGMENTS FOR CONTEMPT ON HABEAS CORPUS: See numerous cases cited in note to *Commonwealth v. Lecky*, 26 Am. Dec. 49; Church on Habeas Corpus, secs. 306-346; Rapalje on Contempts, secs. 155-159.

ATTACKING JUDGMENTS GENERALLY BY HABEAS CORPUS: *Commonwealth v. Lecky*, 26 Am. Dec. 41, note; *Bell v. State*, 45 Id. 130, and notes to same 133; Church on Habeas Corpus, secs. 362-385; Freeman on Judgments, sec. 619-626.

ADJUDICATION ON HABEAS CORPUS AS RES ADJUDICATA: *Mercein v. People*, 35 Am. Dec. 653, and note 669; Church on Habeas Corpus, secs. 385, note, 386-389; Freeman on Judgments, sec. 324.

ASSAILING CONVICTION UNDER UNCONSTITUTIONAL STATUTE BY HABEAS CORPUS: *Fisher v. McGirr*, 61 Am. Dec. 381; Church on Habeas Corpus, secs. 72, 304, 370; Freeman on Judgments, sec. 624.

DETERMINING CUSTODY OF CHILDREN ON HABEAS CORPUS: *State v. Smith*, 20 Am. Dec. 324, and exhaustive note thereto on the subject 330; *In the Matter of Kottman*, 27 Id. 390; *Mercein v. People*, 35 Id. 653, and note discussing the subject 668; *People v. Mercein*, 38 Id. 644; Church on Habeas Corpus, secs. 387, 426-454.

COURTS HAVE INHERENT POWER TO PUNISH FOR CONTEMPTS, independent of any statute: *Ex parte Adams*, 59 Am. Dec. 234, and cases cited in note thereto 243; Rapalje on Contempts, sec. 1.

HABEAS CORPUS ALONE CANNOT BE USED AS WRIT OF ERROR: *Commonwealth v. Lecky*, 26 Am. Dec. 40, note.

FOR VARIOUS PHASES OF THE PRINCIPAL CASE, see same case, 4 Am. L. Reg. 27; 3 Id. 741; 7 Opin. Atty. Gen. 482.

WHEN COURT MAY REFUSE WRIT OF HABEAS CORPUS.—1. *It Issues upon Probable Cause*. In order to better understand when the court may refuse the writ, some benefit will be derived from a knowledge of when it will be granted.

The law on this point is briefly this: the petition must show probable cause, and upon such cause being shown, the writ of *habeas corpus* cannot be denied to the relator, for it then becomes a constitutional right. Neither can it be denied where the granting of it is made an imperative duty by statute. The *habeas corpus* act of the United States, and that of most of the states, provides that it shall be granted without delay, upon the proper showing. It is sometimes said that the *habeas corpus* is a writ of right, but not a writ of course, since cause must be shown. It is a high and imperative writ, and issues, it is true, as a matter of peremptory right, but it can only issue to one entitled to it either at common law or under statutes. Neither should it be granted without inquiry. There seems to have obtained in England, prior to the year 1820, a notion that the court was bound in the first instance to issue a *habeas corpus* at all events without exercising its discretion as to the grounds upon which the writ was moved: *Rex v. Hobhouse*, 2 Chit. Rep. 211; S. C., 3 Barn. & Ald. 420. But the direct course of later decisions, both English and American, is to establish the rule that probable cause must first be shown to obtain the writ, whether it be granted at common law or under the statute. This rule has been uniformly followed in the United States in both the state and federal courts, and is maintained by the following decisions: *Ex parte Watkins*, 3 Pet. 201; *United States v. Lawrence*, 4 Cranch C. C. 521; *Ex parte Winder*, 2 Cliff. 89; *Matter of Keeler*, Hempst. 311; *In re Gregg*, 15 Wis. 479; *In re Griner*, 16 Id. 423; *Ex parte Milligan*, 4 Wall. 3; *Ex parte Williamson*, 4 Am. L. Reg. 27; *Ex parte Campbell*, 20 Ala. 89; *Sim's Case*, 7 Cush. 285. This question came before the court of king's bench in *Rex v. Hobhouse*, *supra*, and was well considered. It was there decided that, whether the court granted a *habeas corpus* under the common-law jurisdiction or under the statute, there ought always to be a proper ground laid before the court as justification in granting it. "It is not to be granted as a matter of course and at all events, but the party seeking to be brought up by *habeas corpus* must lay such a case on affidavit before the court as will be sufficient to regulate the discretion of the court in that respect. The court will not in the first instance grant a *habeas corpus*, when they see that in the result they must inevitably remand the party." *Rex v. Hobhouse*, 2 Chit. Rep. 211; S. C., 3 Barn. & Ald. 420; *Ex parte Watkins*, 3 Pet. 201. Abuses of discretion by the judge or court in deciding upon the question of probable cause can hardly be a subject of complaint by criminals, when they have such unlimited power to choose from the judiciary in making numerous applications, which they have in both England and America: *Ex parte Partington*, 13 Mee. & W. 682; *King v. Suddis*, 1 East, 314; *Ex parte Kuine*, 14 How. 117; *Ex parte Robinson*, 6 McLean, 360. In *Ex parte Milligan*, 4 Wall. 112, 113, it was held that a petition for a *habeas corpus*, properly presented to a court of competent jurisdiction, is the institution of a "cause" on petitioner's behalf, and the allowance or refusal of the process is matter of law, and not of discretion. According to that decision, "when the petition is filed and the writ prayed for, it is a suit, the suit of the party making the application." That writ of *habeas corpus* is a civil proceeding, see *Ex parte Tom Tong*, 108 U. S. 556. Requiring probable cause to be shown "does not restrain the full and beneficial operation of this writ, so essential to the protection of personal liberty. The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had in the first instance on the application or subsequently on the return of the writ, or partly on one and partly on the other, it must depend upon the same facts and principles and be governed by the same rule of law:" *Sim's Case*, 7 Cush. 293.

2. *Denial of the Writ.*—Courts of justice may refuse to grant the writ of *habeas corpus* where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason expressed in the warrant of commitment: *In the Matter of Winder*, 2 Cliff. 89. So when it appears upon the applicant's own showing that there is no sufficient ground *prima facie* for his discharge, the court will not issue the writ: *Sim's Case*, *supra*; *Ex parte Milligan*, 4 Wall. 2; *Ex parte Williamson*, 4 Am. L. Reg. 27; *Ex parte Campbell*, 20 Ala. 89; *Ex parte Kearney*, 7 Wheat. 38; *Commonwealth v. Robinson*, 1 Serg. & R. 353; *Ex parte Pardy*, 1 L. M. & P. 26; *In re Griner*, 16 Wis. 447; *Ex parte Bushnell*, 8 Ohio St. 599; *In re Gregg*, 15 Wis. 479. The application may be denied in the cases excepted in the *habeas corpus* acts of the various states; but cannot be denied where the granting of it is made an imperative duty by statute. The statute of 31 Car. II. made no alteration in the practice of the courts in granting the writs of *habeas corpus*, and when a single judge in vacation time grants them under this statute in criminal cases, a copy of the commitment, or an affidavit of the refusal of it, must be laid before him. That act did not take away the court's discretion; and the practice of the king's bench and of the judges of that court has been that the foundation upon which the writ is prayed should be laid before the court or judge who awards it: *Rex v. Hobhouse*, *supra*. The same principle of practice is established in the courts of the United States, both state and federal. See *habeas corpus* act of the United States, and the *habeas corpus* acts of the various states, the common law prevailing where no statutory provisions are found. To allow the writ of *habeas corpus* to be issued without inquiry would make it a mere ministerial act, and it might be issued by the clerk of a court or other ministerial officer as any ordinary writ in such cases: *Sim's Case*, *supra*. The reason why the penalty for a refusal of the writ was imposed by the statute of 31 Car. II. was to obviate abuses, and the difficulty which was often experienced before the passage of that act in obtaining the writ in vacation time. The judges could not hear the proceedings, and they sometimes honestly and sometimes corruptly refused all applications, whether well founded or not: Church on Habeas Corpus, sec. 17.

3. *Penalty for Refusing the Writ.*—Under the statute of 31 Car. II., officers authorized to grant the writ of *habeas corpus* were subjected to a penalty for refusing it where it should have been granted. But this provision did not destroy the discretion of the judge, either in term time or in vacation. He still had to determine whether there was probable cause, and if not, it was his duty to remand the prisoner: *Rex v. Hobhouse*, *supra*. Judicial tribunals having acquired jurisdiction of the writ had power to decide right or wrong, but they were governed by the rules of law collectible from precedent and principle. There is no pecuniary penalty of this kind provided for in the *habeas corpus* act of the United States, but there is in the acts of most of the individual states. "In some of them the statutes are silent as to any penalty in case of a refusal of the writ. In some, the penalty applies only to a refusal of the writ by a judge in vacation or at chambers; while in others, the courts as well as the judges in vacation are not only subject to a penalty for refusing a *habeas corpus*, but also for unnecessarily delaying to issue it. But of course it must be a proper application, and appear that the writ ought to issue. The order for the writ of *habeas corpus* to issue is a judicial act; but the issuance of the writ itself by the prothonotary or clerk is a ministerial act: *People v. Nash*, 5 Park. Cr. 473; 8 C., 25 How. Pr. 307; 16 Abb. Pr. 281; *Nash v. People*, 36 N. Y. 607.

It is doubted whether the refusal of a proper application for the writ of

habeas corpus by a judge in vacation or at chambers in his discretion will subject him to the statutory penalty; but there is authority for the proposition that the chancellor and judges may refuse a proper application for the writ if applied for in term time, and the penalty will not attach: See *Rez v. Hobhouse*, *supra*; *Yates v. Lansing*, 5 Johns. 282; *Matter of Ferguson*, 9 Id. 239; *Ex parte Ellis*, 11 Cal. 226. The subject of this note will be found discussed in Church on Habeas Corpus, secs. 92-96.

BOWERS v. BOWERS.

[26 PENNSYLVANIA-STATE, 74.]

ADMINISTRATION OF DECEDENT'S ESTATE RESEMBLES OFFICE; but if it be not an office, it is strictly a trust, and as such is not to be purchased for a price which creates in the trustee an interest adverse to that of the *cestui que trust*.

CONTRACT TO PURCHASE OFFICE OF ADMINISTRATOR, from one who has a lawful right to such trust, is against public policy and void. The law will not support such a consideration for an agreement.

ASSUMPSIT by George Bowers against William Bowers. Romulus J. Bowers died in 1851 intestate, and was indebted to plaintiff, his father, on two promissory notes. Defendant agreed if plaintiff would renounce his right to letters of administration on decedent's estate, and permit and procure the same to be issued to defendant, that he would assume and pay the amount of the notes plaintiff held against the estate. Plaintiff complied. Verdict for plaintiff, and defendant moved for a new trial and in arrest of judgment. Rule for new trial was discharged and judgment arrested. Defendant appealed.

F. C. Brewster, for the plaintiff in error.

W. S. Price and G. W. Thorn, for the defendant in error.

By Court, **WOODWARD, J.** The consideration of the contract sued on was the purchase of the office of administrator from him upon whom the law devolved the right to it, and the only question in the record is, whether that is such a consideration as the law will support. I call it an office, not because it is so strictly, but because it very much resembles one, and is frequently so called in the books. An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. An administrator is appointed by a public officer, under his seal of office, to exercise a trust and perform duties which are carefully defined by law, and which affect both public and private interests, and his compensation is measured by legal standards, though not

defined in the fee-bill. In *Beck v. Stitzel*, 21 Pa. St. 522, it was held that the words were actionable without proof of special damage, which imputed to an administrator "a positive and fraudulent breach of his official oath." If public policy forbids traffic in the office of postmaster, as was decided in *Filson v. Himes*, 5 Id. 456 [47 Am. Dec. 422], it will, for superior reasons, interdict barter in respect to the more sacred trust of administration.

But if administration of a decedent's estate be not an office, it is strictly a trust, and as such is not to be purchased for a price which creates in the trustee an interest adverse to the *cestui que trust*. On this point we cannot do better than adopt the reasoning of the learned judge who tried the cause.

It is true, a creditor may administer his debtor's estate, and if William made himself a creditor by assuming the debts which George held against the estate, that was not the disqualifying circumstance. The administration would nevertheless be effectual and valid. But by agreeing to pay George the full amount of his debts, without regard to the sufficiency of the assets, William made a contract that was prejudicial to other creditors, for he bound himself so to administer the estate so as to indemnify himself. If all the debts could not be fully paid, he had a separate or peculiar interest that this one should be, and thus he placed himself in possible antagonism to those whose interests he was bound to represent and guard. A mere creditor administrator has an interest that his debt should be fully paid, but he has contracted for no preference over others. His interest is common with them, and the nearer he can bring the assets to full payment the better for them.

The question here is not upon the legality of the administration, but upon the sufficiency of the consideration for the defendant's promise; and as that in its very nature endangered the purity of the trust, the law will not sanction it.

The case of *Hind v. Holdship*, 2 Watts, 104 [26 Am. Dec. 107], much relied on in the argument, is in no respect analogous. An assignee promised his assignor that he would pay certain creditors, not as a means of obtaining the assignment, but because the assignor wished to prefer them. The assignment, without any expression in it of the desired preferences, was held to be a sufficient consideration of the promise. The point ruled here did not arise, and was not decided in that case.

On the whole, we are of opinion that the court did right in arresting the judgment, and their order is affirmed.

CONTRACTS FOR SALE OF OFFICE ARE VOID, AS AGAINST PUBLIC POLICY: *Outon v. Rodes*, 13 Am. Dec. 193; *Salling v. McKinney*, 19 Id. 722; *Groton v. Wadloborough*, 26 Id. 530, and note 532.

CONTRACTS TO PROCURE OFFICIAL APPOINTMENT ARE VOID, AS AGAINST PUBLIC POLICY: *Filson v. Himes*, 47 Am. Dec. 422; *Faurie v. Morin*, 6 Id. 701.

SMITH v. GRIM.

[26 PENNSYLVANIA STATE, 95.]

OWNER'S FRAUDULENT CONVEYANCE OF LAND IS GOOD AS AGAINST HIM AND HIS HEIRS, and bad only as against creditors.

IF OWNER CONVEYS LAND IN FRAUD OF HIS CREDITORS, AND DIES, HIS HEIRS ARE NOT NECESSARY PARTIES to a judgment against his personal representatives, in order to charge the land with decedent's debts.

SHERIFF'S DEED IS COMPETENT EVIDENCE FOR DEFENDANT IN EJECTMENT, although acknowledged after suit was brought, if the sale was prior to the commencement of the action.

TENANT OF SHERIFF'S VENDEE, TAKING POSSESSION OF PREMISES BETWEEN DATE OF SALE and acknowledgment of deed, cannot be treated as an intruder, where the true owner comes in and defends his possession.

EJECTMENT, brought by Daniel Smith and wife against Joshua Grim and Andrew Giltner, to recover a tract of land, of which John Notestein was the owner, and who, on March 9, 1844, conveyed it by deed to Catharine Fry, who was married to Smith in 1847. The consideration named in the deed was five hundred dollars, but no money was paid. Catharine's services for many years in Notestein's family were alleged to be the real consideration for the conveyance. On March 11, 1844, Notestein made a general assignment for the benefit of his creditors, but the proceeds of the property assigned were only sufficient to discharge the liens against his real estate and pay the expenses of the trust. Notestein lived on the premises until he died in 1846. At the time of the conveyance to Catharine, Notestein was indebted to Grim, one of the defendants, for which he brought suit against his administrator and recovered judgment. Grim had the premises in dispute levied on, condemned, and sold at sheriff's sale on March 18, 1850. He bought them himself, and a deed was duly acknowledged to him by the sheriff on May 2, 1850. On March 21, 1850, Giltner, one of the defendants, entered upon the premises under a lease from Grim. This action was instituted on May 1, 1850. Verdict for defendants, on the ground that the conveyance was fraudulent as to creditors. The admission of the judgment in favor of Grim against Notestein's ad-

ministrator, and of the sheriff's deed to Grim under it, were assigned as error.

Stiles and R. E. Wright, for the plaintiff in error.

King and Longenecker, contra.

By Court, LOWRIE, J. The court left to the jury the question of the fraudulency of the conveyance of Notestein to Mrs. Smith, in the very terms of the fourth point put by his counsel, and they found the fact against her. We therefore assume this fact as settled, in considering the other points.

The conveyance is good as against Notestein and his heirs, and bad only as against creditors. His heirs have and can have no interest in the process by which the creditors seek to recover it or its value from the fraudulent vendee, and therefore, they were not necessary parties to the suit against the vendor's administrators, so far as it could be used to reach this land. The record of the judgment, and the sheriff's sale and deed made under it, were therefore competent evidence. And the competency of the deed is not affected by the fact that it was not acknowledged until the next day after this suit was brought, for the sale was before. The tenant cannot be treated as an intruder where the true owner comes in and defends his possession.

Judgment affirmed, and record remitted.

CONVEYANCES, FRAUDULENT AS TO CREDITORS: *Hutchison v. Kelly*, 39 Am. Dec. 250, and note 263; *Trimble v. Turner*, 53 Id. 90, and notes 94; *Forsyth v. Matthews*, Id. 522; *Lisloff v. Hart*, 57 Id. 203; *Oriental Bank v. Hastings*, 37 Id. 140; *Feigley v. Feigley*, 61 Id. 375; *Fowler v. Stoneum*, 62 Id. 490, and numerous citations in note thereto 505; *Snodgrass v. Andrews*, 64 Id. 169; *Clark v. Depeuw*, Id. 717.

FRAUDULENT SALE AS TO CREDITORS DOES NOT BIND THEM, BUT DOES BIND PARTIES to such contract, and the heirs of the debtor or grantor, and cannot be avoided or set aside by them: See note to *Stewart v. Kearney*, 31 Am. Dec. 484; *McGee v. Campbell*, 32 Id. 783; *Boyd v. Barclay*, 34 Id. 762, and note thereto 765, discussing at length the rights of parties to illegal or fraudulent transactions: *Scott v. Purcell*, 39 Id. 453, and numerous other cases cited in the note to *Fowler v. Stoneum*, 62 Id. 505.

THE PRINCIPAL CASE WAS CITED in *Drum v. Painter*, 27 Pa. St. 149, to the point that a conveyance of land made with the intent to hinder, delay, and defraud creditors is good against every interest except that intended to be hindered, delayed, or defrauded. Neither the grantor nor his heirs or devisees can gainsay the deed. Where a creditor seeks to recover the estate from a fraudulent grantee, he may levy upon and sell it, if his judgment is against the personal representative, without notice to the widow and heirs, for they are strangers to the contest. And in *Soles v. Hickman*, 29 Id. 346, it was cited to the point that if the ancestor parted with his title in fraud of creditors, his heirs cannot inherit; and on a remedy sought against it, they are not entitled to notice.

ALBRIGHT v. LAPP.

(26 PENNSYLVANIA STATE, 99.)

JUSTICES OF PEACE DERIVE ALL THEIR JUDICIAL POWERS FROM LEGISLATION. They exercise no common-law powers.

JUSTICE OF PEACE, IN PENNSYLVANIA, HAS NO POWER TO SUMMARILY PUNISH PERSON FOR CONTEMPT committed before him.

REMEDY OF JUSTICE OF PEACE FOR CONTEMPT COMMITTED IN HIS PRESENCE is to bind the contumacious party over to answer at court, and to be of good behavior meanwhile.

TRESPASS *vi et armis* by Ralph Lapp against Henry Albright, a justice of the peace. Lapp was committed to jail for contempt in using alleged insulting and contemptuous language during some proceedings before the justice. Plaintiff on the trial proved the imprisonment, and gave in evidence the warrant of commitment charging him with abusive language, etc. He then offered to prove the conversation, and all matters that took place, for the purpose of showing that no contempt was committed. This was admitted by the court under defendant's exception. The court charged that a justice of the peace had no power to commit for contempt. Plaintiff got a verdict for fifty dollars, and defendant removed the record by writ of error, in which the admission of the evidence above stated was objected to.

Lear, for the plaintiff in error.

Dubois, for the defendant in error.

By Court, WOODWARD, J. In England, where the office of justice of the peace is invested with more dignity and a larger jurisdiction than with us, the power of punishing contempts by attachment and summary conviction seems not to belong to it. Even the sessions, which is a court of record, held by two or more justices, one of whom must be of the quorum, has not power to punish disobedience of an order of court by attachment: *King v. Bartlett*, 2 Sess. Cas. 291.

Blackstone, in his commentaries, limits this power to what he styles the "superior courts of justice," and thinks it was derived to them through the medium of courts of equity, the whole of whose proceedings were, till the introduction of sequestrations, in the nature of process of contempt acting only *in personam*, and not *in rem*.

In Pennsylvania there has been no legislative grant of this power to justices of the peace. The act of June 16, 1836, like that

which preceded it, relates altogether to the "courts of the commonwealth;" and that this expression includes only the higher courts, which are in every sense courts of record, and which exercise a common-law or equity jurisdiction, is apparent from the specifications of the statute. Thus the disobedience of "officers of such courts," and of "jurors," and contempts in "open court," are punishable, but none of these specifications belong to a justice's court, for in that there are neither officers nor jurors, nor any ceremony which makes it in the sense of the statute an "open court." And this statute is restrictive. The legislature intended to define, with all possible precision, the cases in which these higher courts might exercise the power, and to restrain its exercise in all other cases. If they had intended to give it to justices of the peace, they would have said so, and would have limited it as they did in conferring it upon arbitrators.

It is, moreover, to be considered that justices derive all their judicial powers from legislation. They exercise no common-law powers. In virtue of their commissions, they are, as at their first institution, conservators of the public peace, but their judicial functions are such and only such as the legislature have made them, and no act has conferred the power of punishing contempts.

In McKinney's Justice, p. 116, it is said the nature of the office implies the power. There would be great force in this observation if the law afforded no other means of protecting a justice from insult and violence while performing his judicial duties, but it does. In *Brooker v. Commonwealth*, 12 Serg. & R. 175, it was decided by this court that indictment would lie for a contempt of a justice of the peace, which, though short of a breach of the peace, amounted to an obstruction of his office, and it was suggested by Judge Gibson that the power to hold the offender to bail to answer upon indictment, and to be of good behavior meanwhile, and to commit him in default of bail, rendered it unnecessary to the administration of justice, that a justice of the peace should exercise the high power of punishing by attachment, which in the hands of many magistrates might become a public grievance. Similar views were expressed by Judge Hallowell, in *Filler v. Probasco*, 2 Browne, 142.

For more than a hundred and fifty years these remedies have proved adequate for the protection of this important branch of our judicial system, and if the power to punish contempts summarily (which like all irresponsible power is exceedingly liable to abuse) is now to be added, it must be done by legislation. Such

A power, wherever claimed and exercised, needs a firmer basis to stand on than a judicial implication. If the higher courts have derived it from courts of equity, the legislature have defined and limited it; and if the legislature have not defined and limited it in the hands of justices of the peace, it is because they have not derived it from courts of equity or any other source.

We are of opinion, therefore, that the court were wrong in deciding that the justice had jurisdiction to commit for contempt, but they canceled the error by admitting in evidence the circumstances out of which the alleged contempt grew. These were necessary to enable the jury to assess damages discreetly, and they were admissible because the justice had not jurisdiction to punish for contempt.

The only error in the record having been thus remedied, the judgment is affirmed.

JURISDICTION AND POWERS OF JUSTICES OF PEACE ARE DERIVED FROM STATUTORY PROVISIONS: *Martin v. Fales*, 36 Am. Dec. 693.

JURISDICTION OF JUSTICE OF PEACE MUST BE AFFIRMATIVELY SHOWN; nothing is presumed in favor of such jurisdiction: *Spear v. Carter*, 48 Am. Dec. 688; *Piper v. Pearson*, 61 Id. 438.

JUSTICE OF PEACE IS LIABLE AS TRESPASSER, if he goes beyond his jurisdiction: *Adkins v. Brewer*, 15 Am. Dec. 264; *Kelly v. Rembert*, 18 Id. 643; *Clarke v. May*, 61 Id. 470, and note 473; and see *Kelly v. Bemis*, 64 Id. 50, and extended note-51, on liability for acts done under unconstitutional statute.

COMMITMENT OF WITNESS FOR CONTEMPT BY JUSTICE in cause of which he has no jurisdiction is unauthorized and void, and renders him liable in damages: *Piper v. Pearson*, 61 Am. Dec. 438, and note to same 442.

CARSON v. GODLEY.

[26 PENNSYLVANIA STATE, 111.]

GROSS NEGLIGENCE IN CONSTRUCTING AND RENTING INSECURE BUILDING RENDERS OWNER LIABLE to a party whose goods are injured by its fall, if there is no negligence on the part either of tenants or of the party storing the goods.

ONE WHO BUILDS AND LEASES HOUSES IS BOUND BY LEGAL DUTY TO CONSTRUCT THEM IN PROPER MANNER and with good materials and competent workmen, and neither good faith nor even the best faith will relieve him from liability for injuries resulting from failure to do so.

MAXIM, SIC UTERE TUO UT ALIENUM NON LÆDAS, IS NOT LIMITED TO COMMON NUISANCES. It has a much more extensive application, and under it one cannot escape liability where he knowingly leases a building to be so used as to hurt another or his property.

EVIDENCE OF FALL OF OTHER STORES BUILT BY DEFENDANT in the same row is competent to show that the owner had notice of the insufficiency and unsafety of a store similarly constructed; but is not competent to establish his reputation or that of his mechanics as builders.

CASE. Godley built a storehouse five stories high, of granite and brick, in Philadelphia, superintending its erection himself; and when complete, he leased it to the United States government, knowing it was to be used for storage of heavy goods. Iron and hardware were put on the lower floor. While workmen were engaged in storing sugar on the second floor the building fell, destroying a large quantity of sugar belonging to plaintiffs, who seek to recover its value in this action. The jury found a verdict for plaintiffs, and defendant appealed. The other facts and points made and relied upon in prosecuting the appeal sufficiently appear in the opinion.

H. J. Williams and C. E. Lex, for the plaintiff in error.

J. Fallon and Serrill, contra.

By Court, WOODWARD, J. In the case of *Godley v. Hagerty*, 20 Pa. St. 387 [59 Am. Dec. 731], we held the present defendant responsible for an injury occurring at the same time and resulting from the same causes as that of which the plaintiffs in this action complain. It was shown in that case, as in this, that Mr. Godley had rented his building in Granite street to the government of the United States for a public warehouse, and that the agents of the government were engaged in storing sugar when it fell down, killing two men, breaking the arm of Hagerty, and damaging the goods of the present plaintiffs. In two particulars only this case differs from Hagerty's. The plaintiffs here were importing merchants, and the injury was to their goods. Hagerty was a common laborer in the service of the government, and his injury was personal. But these diversities make no difference in the principles of law applicable to the two cases. If, as was urged in the argument, the government was bound to provide safe storage for the plaintiffs' goods whilst they were held in bond, it was equally due to Hagerty that he should not be set to work in an unsafe storehouse, to the peril of life and limb. If, therefore, the present plaintiffs, by reason of their relations to the government, were entitled to seek redress in that quarter, so was Hagerty. As the employee of the government, his relations were quite as direct and intimate with the public authorities—his privacy quite as close—as any which the plaintiffs sustained, whilst the character of his injury gave him

a superior right to compensation. Nor did we decide that the government was not liable to Hagerty. We decided only that Godley was. Counsel do not, therefore, distinguish this case from Hagerty's when they prove that these plaintiffs might have sought redress from the government. Let it be granted that they might, does it follow that Godley is not liable to them? By no means. An injured party is often entitled to redress against more than one wrong-doer, and it is never an objection to his action that he has passed by the intermediate agents of the mischief, and charged the responsibility home upon the author of the evil.

This case, then, incapable of being distinguished in principle from Hagerty's, ought to be considered as ruled by it. All the material facts were identical in the two cases. Judge Bell, not more distinguished for his learning than for the care and ability with which he tried causes at *nisi prius*, stated the principles on which the former case rested; and his judgment, after a severe professional criticism, and full consideration in this court, received our deliberate and unanimous sanction. And in the three years that have elapsed since that decision was pronounced we have seen no occasion to question its principles, but experience and observation have tended rather to confirm them. Such is the eagerness of capitalists for large rewards, that when they undertake to build for the profits of rents, the temptation is strong to cheapen and slight the work. The safety of life and property is lost sight of in the dazzling prospect of a large rent from a small outlay. Foundations are put down and walls run up in such haste, and with such materials, as to be wholly inadequate for the purposes designed; the defects all the more pernicious and unpardonable because concealed; and now and then the community are appalled by some shocking catastrophe involving loss of lives and limbs and property. The cupidity which is at the bottom of the mischief, true to nothing but its own instinct, will of course seek to charge the consequences of its folly on the tenant, as if because he was deceived the original guilt was canceled. Where the tenant has been guilty of negligent or improper use of the building, he is undoubtedly liable to parties injured by its fall, and even where there has been no negligence on his part, we do not say he is exempt, for that case has not yet occurred; but where, as in the case before us, it is found, on abundant proof, there was no negligence, either in the tenants or the plaintiff, it is a salutary rule of law that holds the owner answerable for his gross neglect in con-

structing and renting an insecure building. We have no thoughts of relaxing or qualifying a rule so obviously just and politic; but if we had, we would hardly do it in a case involving the very same circumstances to which we so recently applied it.

It may be proper, however, on account of the vehemence with which the rule is assailed, to examine its foundations a little more minutely than was done in the former case, to see if it be not well grounded in accepted principles and authorities of law.

The lease, in this case, contained no express covenant or condition that the building was of any particular capacity or quality, and none is to be implied. The government took it for what is called in the lease a "five-story store," and the only covenant which is to be implied is that for quiet enjoyment. There was a while that the English courts acted on the principle that it was an implied condition of every lease that the property was reasonably fit for the purpose for which it was let; as, that a dwelling-house was in such decent repair as to be fit for habitation: *Salisbury v. Marshal*, 4 Car. & P. 65, 19 Eng. Com. L. 409; that its walls were safe: *Edwards v. Etherington*, Ry. & M. 268, 21 Eng. Com. L. 435; that the premises should not become untenable by the bursting of a privy: *Cowie v. Goodwin*, 9 Car. & P. 378, 38 Eng. Com. L. 162; that the house was not infested with bugs: *Smith v. Marrable*, 11 Mee. & W. 5; but they have receded from all this, and hold now that in a demise of land there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it was taken: *Sutton v. Temple*, 12 Id. 52; nor in the lease of a house, that it was at the time of the demise, or should be at the commencement of the term, in a reasonably fit state and condition for habitation.

In the case of *Arden v. Putten*, 10 Id. 321, the house became uninhabitable, and utterly useless to the tenant by reason of original defects in the foundations; and it was held that the tenant could not, in consequence thereof, throw up the house and refuse to pay rent. "The tenant ought," said Baron Alderson, "to examine the house before he takes it." If the present action rested on the ground of contract, express or implied, it could not be sustained. Counsel argued with great propriety that if an implied warranty of the quality of a house could be deduced from a lease of it for a term, it would arise, likewise, from a conveyance of the fee, and run with the land, which would restrain alienation. Some torts result from contracts; but that for which this action was brought has no such foundation. Its root is in the malfeasance of the defendant--in the

misuse of that which is his own—not in the breach of any condition, express or implied. It is apparent, therefore, that the English cases adverted to, all of which proceed on contract, do not touch the ground assumed in *Godley v. Hagerty*, *supra*, and the present.

The underlying principle of this case is found in that great maxim of the common law, *Sic utere tuo ut alienum non lædas*. This is a principle of universal obligation, and it attended Mr. Godley when he undertook to cover his lot in Granite street with storehouses for the use of tenants. The application of this principle is illustrated by innumerable cases in the books. Setting aside all those that relate to mere personal rights and chattel interests, I select a few to show how it applies to an owner of real estate. And here again is a large class of cases such as grow out of obstructions of private ways, diversions of watercourses, and common nuisances, that may be omitted. But there is a class of cases in which the owner of real estate has been held liable in damages for that which it was perfectly lawful for him to do on his own premises, but which, done without that skill and prudence which he was bound to employ, has worked injury to another. Thus in *Vaughn v. Menlove*, 7 Car. & P. 525, 32 Eng. Com. L. 613, the plaintiff brought case to recover damages for the loss of two cottages burned down by the spontaneous combustion of defendant's hay-rick, defectively erected on his own land. Patteson, J., directed the jury to inquire whether defendant had acted as a man of ordinary skill and prudence would have acted, or whether, through negligence and carelessness, the plaintiff's property had been consumed. It was not enough, he said, that the defendant acted *bona fide* according to the best of his own individual judgment—a doctrine which the whole court said, in affirming the judgment, would utterly preclude any certain and intelligible rule on the subject.

In exact agreement with this case, Judge Knox, on the trial of the case under consideration, first directed the attention of the jury to the question whether the defendant caused his building to be constructed in a proper manner, and with good materials, and by competent workmen. These things it was most clearly his duty to do as a man of ordinary prudence, and these things the jury have found he did not do. No matter how sincere the self-confidence that prompted him to superintend the work himself and save the expense of a master-builder, and to use imperfect and unfit materials, the *bona fides*, even *optima*

fides, could not relieve him from the clear legal duty that was on him to act in a "proper manner and with good materials and competent workmen."

But to proceed with the authorities: *Tubervil v. Stamp*, 1 Salk. 13, S. C., *sub nom. Turberville v. Stampe*, Ld. Raym. 264, was an action on the case for negligently keeping fire by the defendant *in clauso suo*, whereby a neighbor's corn was burned. After verdict for the plaintiff, it was objected that, by the custom of the realm, liability for fires extended only to those in the house or curtilage which were under the power of the owner; but, said the court, the fire in his field is his fire as well as that in his house; he made it, and he must see it does no harm, and answer the damage if it does. To the same effect is the case of *Barnard v. Poor*, 21 Pick. 378, which was a recovery also for damage from fire kindled on the defendant's own land.

In *Russell v. Prior*, 1 Serg. & R. 460, a tenant for years erected a wall which darkened the ancient windows of a neighbor, and then made an under-lease to J. S. The party injured brought suit for the nuisance, and recovered damages, and then brought a suit for the continuance. Both actions were against the first tenant, the lessor in the last lease, and the question was whether, after recovery for the erection, an action would lie against him for the continuance after he had leased to another—*et per cur.* "It lies, for he transferred it with the original wrong, and his demise affirming the continuance of it; he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions."

That a party for whose benefit work has been negligently done is answerable for consequences, was strikingly illustrated in the case of *Bush v. Steinman*, 1 Bos. & Pul. 404. The defendant had purchased a dilapidated house by the wayside, which he had never occupied. He contracted with the surveyor of buildings to repair it. The surveyor contracted with a carpenter to do the whole labor, and to furnish all materials. The carpenter employed a brick-layer under him, and he again contracted for a quantity of lime with a lime-burner, by whose servant the lime was deposited in the road in front of the defendant's house. The plaintiff and his wife, passing in a chaise, were upset and injured by reason of the lime in the highway. On great consideration, the defendant was held liable, not on the ground that the relation of master and servant existed between him and all of the employees, but because he was the owner of the premises for whose benefit the nuisance was created, and having suffered

it to remain in front of his building, and between it and the middle of the highway to which his premises presumptively extended, he was answerable for it.

So in *Randleson v. Murray*, 8 Ad. & El. 109, 35 Eng. Com. L. 342, a warehouseman at Liverpool employed a master-porter to remove barrels from his warehouse. The master-porter employed his own men and tackle, and 'through the negligence of the men the tackle failed, and a barrel fell and injured the plaintiff: held, that the warehouseman was liable in case for the injury.

In *Stone v. Cartwright*, 6 T. R. 411, Lord Kenyon, in ruling that a mere steward of an owner of real estate is not responsible for the acts of the men employed by him for the owner, said: "In all these cases, I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done."

In the case of *Mayor etc. of New York v. Bailey*, 2 Denio, 433, we have the principle distinctly asserted and indicated very much at large that the owner of real estate is responsible for the negligence of those appointed by public authority to make erections on it for the owner's benefit. The city of New York owned the Croton dam, which had been erected to supply the city with water. An unusually high flood in the river swept the dam away, to the injury of the plaintiff, a riparian owner below. He sued the city, and showed that the dam had been defectively constructed. The answer was that the dam had been erected under the supervision of and by the water commissioners, who were public officers appointed by the governor and senate, and over whom the city had no control; but on the ground that they acted at the instance and for the benefit of the corporation, the city was held liable. In *Spencer v. Campbell*, 9 Watts & S. 32, this court held the owners of a steam grist-mill liable for a customer's horse killed by the bursting of a boiler.

Authorities and analogies might be multiplied, but these are sufficient to show that when we apply the principle, *sic utere tuo*, etc., to this defendant, in the circumstances of his case, we inaugurate no novelty.

He knew, for he had been expressly told, that if he leased his storehouse to the government it would be used for heavy storage. He leased to the government without any stipulations against heavy storage. The learned judge was in no error, then, in saying, not by way of construing the lease, but as a

matter of fact, that if the evidence was believed, the building was leased for heavy storage, and the conclusion of law was a necessary one, that it might legally be used as such. But before it was heavily stored, it fell down through inherent defects. Had it fallen before it was used at all—had the superstructure been so defective as to be unable to sustain itself—it would have been indictable as a common nuisance, and nobody doubts that the owner, at whose instance it was erected, would have been answerable to individuals for the damage occasioned; but the wrong consisted, not in erecting walls incapable of standing alone, but in building and renting the store for a specific purpose for which it was unfit and unsafe. In itself it may not have been a common nuisance, but the maxim, *Sic utere*, etc., is not limited to common nuisances. The cases cited, and many more that might be cited, show that it has a much more extensive application, for in all civil acts the law does not so much regard the intent of the actor as the loss and damage of the party suffering. In trespass *quare clausum fregit*, the defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer, judgment was given for the plaintiff, on the ground that though a man may do a lawful thing, yet if any damage thereby befalls another, he shall be answerable if he could have avoided it: Broom's Legal Maxims, 161. Be it, then, that the store was a lawful structure, the defendant so used it as to hurt the plaintiff in his property, and this was to violate a fundamental maxim of the law. With his eyes wide open to the fact that the government would use his storehouse for heavy storage, he let them have it, knowing that it was unfit for such use, and he inserted no word of caution or restraint in the lease. As was said in Hagerty's case, "if, after the building was finished, he knew there were defects in it which unfitted it for the designated purpose, he should have stipulated in the lease against its being used for heavy storage. He omitted his duty in both respects—he did not build a strong storehouse, and he did not forbid heavy storage." Tempted by a large rent, he permitted his building to be subjected to burdens too heavy for it to bear, though lighter than the tenant had the right to impose, and herein is the ground of his liability. We go not one inch beyond the case before us. We say not that he would be liable if he had sold the building, and parted with all control over it;

or if he had employed master-builders, and the best of materials; or if he had stipulated for a use proportioned to its strength; but we pronounce him liable in the precise circumstances of the case. It is not our office to decide possible and hypothetical, but actual, cases—such as are made to hand. And taking this case just as it is presented in the record, we conceive there is a clear legal liability, which considerations of public policy and private right demand should be enforced against the defendant.

The answers of the court to the several points submitted on the part of the defendant were quite as favorable as, in view of the general principles we have discussed, he had any right to expect.

If the evidence of the fall of other stores built by the defendant in the same row had been offered to establish his reputation, or that of his mechanics as builders, it would have been incompetent, on the principle of *Waugh v. Shunk*, 20 Pa. St. 130; but offered, as it was, to bring home notice to him of the insufficiency and unsafety of the kind of building he was about to erect, it was competent proof. It took away all pretense of mistake, and showed a reckless perseverance in wrong-doing, which, if the law cannot prevent, it will punish.

There is nothing in the other bills of exception to evidence that merits discussion.

The judgment is affirmed.

BLACK, J., dissented.

ONE SHOULD SO USE HIS OWN PROPERTY as not to injure the property of another. But it is only when one deviates, either by intention or neglect, from the ordinary use of his property that he is liable for an injury done thereby to another: *Durham v. Musselman*, 18 Am. Dec. 133.

NEGLIGENCE IN CONSTRUCTING BUILDINGS: *Godley v. Hagerty*, 59 Am. Dec. 731, showing the skill and diligence to be used in the erection of buildings; the liability to one injured from insufficient construction; and what one injured by fall of building negligently constructed may show, in a suit for damages against the owner. See note to same 733, on liability of owners of premises defectively constructed or out of repair for injuries resulting therefrom, fully discussing the subject.

CITATIONS OF PRINCIPAL CASE.—It is well settled that there is no implied warranty that the premises are fit for the purposes for which they are rented: *Hazlett v. Powell*, 30 Pa. St. 298. No warranty is implied that property demised is fit for the purposes for which it is demised: *Harlan v. Lehigh Coal & Nav. Co.*, 35 Id. 292. Where plaintiff complains of the original wrong, the secondary or consequential wrong is no answer to his complaint: *Rauch v. Lloyd*, 31 Id. 367. "If I employ a well-known and reputable machinist to construct a steam-engine, and it blows up from bad materials

or unskillful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and *respondet superior* is the rule:" *Ardesco Oil Co. v. Gilson*, 63 Id. 151. It was cited in *Pittsburgh, F. W. & C. Ry Co. v. Gilleland*, 56 Id. 451, to illustrate the growth of the doctrine that while the citizen must often suffer for the public good, his suffering is not to be aggravated by unskillfulness and carelessness.

PAUL v. CARVER.

[26 PENNSYLVANIA STATE, 223.]

PRESUMPTION IS THAT OWNERS OF LAND ON EACH SIDE OF STREET, ROAD, OR HIGHWAY GO TO CENTER of such boundary, and they have the exclusive right to the soil, subject to the right of passage in the public.

CONVEYANCE OF LAND BOUNDED BY PUBLIC STREET, DITCH, FRESH-WATER RIVER, OR HIGHWAY PASSES TITLE TO CENTER of such boundary; as it is regarded as a single line, and the thread of such boundary is the monument or abuttal. Monuments control measurements.

IT WILL NEVER BE PRESUMED THAT GRANTOR, after parting with all his right and title to the adjoining land, intended to withhold his interest in a street, road, or highway, to the center of it.

GRANTEE'S TITLE CANNOT BE LIMITED TO EDGE OF PUBLIC STREET, DITCH, HIGHWAY, OR FRESH-WATER RIVER, unless there is an express exception in the deed to that effect, or some clear and unequivocal declaration, or certain and immemorial usage.

ALTHOUGH MEASUREMENT OF DISTANCE SET FORTH IN CONVEYANCE BRINGS LINE ONLY TO SIDE of the street or highway, this is not sufficient to control the rule of law which carries the title to the center of such street or highway.

EJECTMENT by Carver against Paul to recover a certain strip or piece of ground, being a portion of the northern part of Tidmarsh street, between Twelfth and Thirteenth, as formerly laid out, in Philadelphia. The part of the street in dispute was opened by public authority in 1827, but under legislative enactment the course of the street was changed in 1835, and in 1850 an act was passed vacating the part of the street in dispute. In 1836 Mrs. Brinton conveyed the premises bounding on Tidmarsh street, between Twelfth and Thirteenth, to William Perry, the deed calling for the northern side of the street. Perry gave a mortgage for the purchase money. It was foreclosed, and the premises sold to Carver, who received a sheriff's deed January 8, 1853. In 1847 the commissioners of Moyamensing, the township including the land in dispute, recovered judgment against Perry on a certain claim they had against him, and caused the

premises between Twelfth and Thirteenth streets, bounding on Tidmarsh, and running to the center of old Tidmarsh street, vacated, or about to be vacated, and which was fifty feet wide, to be sold at sheriff's sale. Deeds were made to intermediate purchasers, and the strip in dispute, about twenty-five feet wide, the half of old Tidmarsh street, between Twelfth and Thirteenth, became vested in James W. Paul, against whom this ejectment was brought by Carver, who alleged that title to the same became vested in him under his purchase on the proceedings upon the mortgage given by Perry to Mrs. Brinton. The court below ruled that under the sale upon the mortgage the plaintiff had a title to the middle of the street, and that, being vacated by authority of law, he was entitled to recover possession. Plaintiff got a verdict, and defendant sued out a writ, assigning the ruling of the court as wrong.

G. W. Biddle, for the plaintiff in error.

E. K. Price and C. E. Lex, for the defendant in error.

By Court, LEWIS, C. J. The general rule is well established that where a stream not navigable is called for in a deed as a boundary or monument, it is used as an entirety to the center of it, and to that extent the fee passes. It would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the grantee in such cases to the edge of the river: 3 Kent's Com. 428. So land bounded by an artificial ditch extends to the center of the ditch: *Warner v. Southworth*, 6 Conn. 471. So where a street is called for as a boundary, the title passes to the center of the street. "The law with respect to public highways and to fresh-water rivers is the same, and the analogy perfect as concerns the right of soil. The presumption is that the owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public:" 3 Kent's Com. 432. Chancellor Kent declares that "the established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, as part and parcel of the grant. The idea of an intention in a grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to universal practice; and it was said in *Peck v. Smith*, 1 Conn. 103 [6 Am. Dec. 216], that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever re-

tained by the vendor. It would require an express declaration, or something equivalent thereto, to sustain such an inference:" 3 Kent's Com. 433. If no other reason could be assigned in support of this rule-of construction, the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights, ought to have great weight. A contrary opinion would introduce a flood of unprofitable litigation. But the rule has its origin in a regard to the nature of the grant. Where land is laid out in town lots, with streets and alleys, the owner receives a full consideration for the streets and alleys in the increased value of the lots. The object of the purchasers of lots is to enjoy the usual benefits of the streets. The understanding always is that houses may be erected fronting on the streets, with windows and doors, and door-steps and vaults. These latter always extend beyond the line of the street, and it is necessary that they should so extend. If a right of property in the streets might, under any circumstances, be exercised by the grantor, he might deprive his grantee of the means of entry into or exit from his house, and of all the enjoyments of light and air, and might thereby deprive him of the means of deriving any benefit from his purchase. In large cities vaults under the sidewalks for receiving fuel and other necessities are almost universally constructed. In some instances, where lots are owned by the same person on each side of the street, these vaults extend entirely across it, forming an underground communication between the two properties. Shade trees, posts, awnings, and many other convenient structures are constantly erected. All these might be prohibited by the original grantor if his right of property remained after parting with the lots. If the streets were to be vacated, of what value would they be to the original grantors, unless for the purposes of annoyance to the lot-owners? A long strip of ground fifty or one hundred feet wide, and perhaps several miles in length, without any access to it except at each end, is a description of property which it is not likely either party ever contemplated as remaining in the grantor of the lots on each side of it.

Influenced by these considerations, the law has carried out the real intention of the parties by holding that the title passed to the center of the street subject to the right of passage. Where a street is called for as a boundary, it is regarded as a single line. The thread of the road is the monument or abuttal: *Newhall v. Ireson*, 8 Cush. 595 [54 Am. Dec. 790]. Measurements are of small importance where monuments are called for. Monuments

control measurements. There is no doubt whatever as to the existence of the general rule; but it is thought by the plaintiff in error that where the deed calls for a particular side of a street the case is taken out of the rule. In our opinion, this is a circumstance entirely too insignificant to produce a result so inconvenient and so contrary to the practice of the people. This very question was decided when these parties were here in another form of action. It is therefore unnecessary to examine in detail either the English or American decisions on the subject. While they all fully recognize the existence of the rule that a conveyance of land bounded by a highway passes to the grantee a title to the center of the way, there is some difference of opinion in the application of it to particular cases. A rule founded upon policy, and tending to guard against inconveniences of the most alarming character, ought not to be frittered away by distinctions founded on differences in phraseology, which might readily escape attention. The paramount intent of the parties, as disclosed from the whole scope of the conveyance and the nature of the property granted, should be the controlling rule. Although the measurement of the distance set forth in the conveyance brings the line only to the side of the road, this is not sufficient to control the rule of law which carries the title to the center of it: *Newhall v. Ireson, supra*. Although the deed says nothing about a highway, and although the south line of the land conveyed corresponds with the north line of the highway as originally laid out, still this strong circumstance has been held entirely insufficient to control the general intendment of law that the title passes to the center of the highway: *Champlin v. Pendleton*, 13 Conn. 23. Even where a grant described the land as "beginning on the westerly side of the county road," "thence running northerly, touching the said westerly side of said road forty rods," this description was held to be insufficient to control the rule of law which extends the title to the center of the road: *Johnson v. Anderson*, 18 Me. 76. The case last cited disposes of the identical question now before us, and we adopt it as a sound exposition of the law. In our own state we have no authoritative decision on the question. *Black v. Hepburne*, 2 Yeates, 331, was a *nisi prius* decision, and the case seems to have been determined on the principle that ejectment would not lie for an easement. *Commonwealth v. McDonald*, 16 Serg. & R. 390, was an indictment for erecting a nuisance in a public highway, in which it was distinctly stated that the public right to the highway, and that only, was decided. *The Union Burial Ground v. Robin-*

son, 5 Whart. 18, was the case of a conveyance before the street was opened, and the deed called for "the south side of Washington street as the same may hereafter be opened." The measurement of one of the lines, terminating at that point, was also stated with great particularity in feet, inches, and fractions of an inch. It may be that these circumstances ought to have had but little weight; but we find that they influenced the decision, and that the court carefully stated that the case of a lot, bounded on a street laid out and dedicated to public use at the time of the grant, would present a different question. That case is, therefore, no precedent for one like the present.

The other assignments of error do not require any special notice. The whole case was properly disposed of by the district court.

Judgment affirmed.

GRANT OF LAND BOUNDED BY STREET, ROAD, STREAM, OR HIGHWAY CARRIES FEE TO CENTER OF SUCH BOUNDARY: *Middleton v. Pritchard*, 38 Am. Dec. 112, and notes 119; *Luce v. Carley*, 35 Id. 637, and numerous cases cited in note thereto 640; *Newhall v. Ireson*, 54 Id. 790, and extended note thereto 793; *Paul v. Carver*, 64 Id. 649, and references in note to same 651; unless the terms of the grant clearly show an intention to stop at the margin, and this, although the monuments are described as standing on the bank or margin of the stream: See note to *Lowell v. Robinson*, 33 Id. 673.

MONUMENTS CONTROL BOUNDARIES, COURSE, AND DISTANCES: *Frost v. Spaulding*, 31 Am. Dec. 150, and note 154; *Suffern v. McConnell*, 32 Id. 439, and note 444; *Newman v. Foster*, 34 Id. 98, and note 105; and note to *Morton v. Jackson*, 40 Id. 110.

ACQUIESCENCE IN BOUNDARY LINE IS EVIDENCE OF AGREEMENT TO ABIDE BY IT, and if continued sufficiently long to give title by prescription, is conclusive evidence: *Jackson v. McConnell*, 32 Am. Dec. 439.

THE PRINCIPAL CASE WAS CITED in *Cox v. Freedley*, 33 Pa. St. 124, as being one carefully decided, and twice reported. Its principle was applied, and Cox allowed to take to the middle of the street. And the circumstance of being bounded by the side of a street, instead of the street itself, was alluded to as "too insignificant to produce a result so inconvenient and so contrary to the practice of the people." In *Wood v. Appal*, 63 Id. 222, it was cited to show that a conveyance of land bounding on the street carried title to the center of it. So, in *Baker v. Chester Gas Co.*, 73 Id. 121. In *Robinson v. Myers*, 67 Id. 17; *Trutt v. Spotts*, 87 Id. 341; *Spackman v. Steidel*, 88 Id. 458, it was cited as showing that it is a well-settled rule in this state that a conveyance of lands bounded on a street, road, or highway gives the grantee a title to the middle of such boundary, if the grantor had title to it, unless he reserved it either expressly or by clear implication. It was cited in *Snider v. Snider*, 3 Phila. 159, to show that "the paramount intent of the parties, as disclosed from the whole scope of the conveyance and the nature of the property granted, should be the controlling rule." It was considered inapplicable in *Allegheny City v. Moorehead*, 80 Pa. St. 138.

BINGHAM v. LAMPING.

[26 PENNSYLVANIA STATE, 340.]

TITLE TO GOODS IN TRANSIT IS PRESUMED TO BE IN CONSIGNEE, and one carrier who receives them from another to be delivered to the consignee is not presumed to know that they are the property of the person who ships them.

CARRIER RECEIVING GOODS CANNOT HOLD THEM TO ANSWER ATTACHMENT at the suit of a creditor of the shipper, previously served upon him; nor is he liable for them if attached while he is in the faithful performance of his contract as a common carrier.

WILLIAM LAMPING, on May 25, 1852, caused a writ of foreign attachment to be issued against John Hance, with notice to William Bingham as garnishee, and which was served by copy on the same day. On June 5, 1852, Bingham & Co. received from another carrier at Pittsburgh eleven hogsheads of tobacco, marked "Hance & Green," to be forwarded by Bingham's line to W. Starr & Sons, at Baltimore, and for which they gave a receipt. Judgment in the attachment suit was given against Hance, on January 28, 1853. *Scire facias* issued against Bingham, the garnishee, to which he pleaded *nulla bona*. Bingham answered interrogations to the effect that he had no knowledge whatever of Hance's interest in the tobacco shipped to Baltimore. Hance resided in Belmont county, Ohio, and was a member of the firm of Hance & Green. Bingham's answers were read on the trial, and it was proved that the tobacco was shipped by Hance & Green to W. Starr & Sons, at Baltimore, to be sold and accounted for to them. Judgment for plaintiff, and defendant Bingham prosecuted his writ of error.

A. W. Loomis, for the plaintiff in error.

McKnight, for the defendant in error.

By Court, LOWRIE, J. This attachment was served on Bingham, the garnishee, simply by leaving him a copy of it, and without the actual seizure of any goods as the property of the defendant. The utmost effect that can be given to such a service is to treat it as a notice to the garnishee to retain, in order to answer the purposes of the attachment, any goods of the defendant that may be in or may come into his hands. The duty imposed upon him by this notice was that he should not allow any goods which he knew, or which the law charged him with the duty of knowing, to be the property of the defendant to pass out of his hands. As he did receive goods of the defendant, and did let them pass out of his hands without knowing

that they were defendant's property, the only question left to be answered is, Did he receive them under such circumstances as to be chargeable with knowledge.

What evidence had the garnishee that the defendant, John Hance, owned this tobacco? We do not discover that he had any except which arises from the fact that nine of the hogsheads were marked "Hance & Green." If this be regarded as some indication of the ownership, all the other circumstances point in a different direction. Hance & Green lived in Ohio, and consigned the tobacco to Starr & Sons, in Baltimore. The carriers brought them by steamer to Pittsburgh, and there contracted with Bingham to perform the remainder of their duty, he giving them a carrier's receipt therefor ten days after the service of the attachment. Now the law makes a bill of lading evidence that the title of goods in transit is in the consignee, and the carriers must have given one, and Bingham received the tobacco in its transit to Starr & Sons, and under the contract with the first carriers to complete their work. Judging, therefore, by the ordinary principles of evidence, Bingham could not suppose that the tobacco belonged to John Hance, but rather to Starr & Sons, and he was right in carrying it to them.

Besides this, it would be strange in the extreme that the law should require of a carrier, receiving goods on his contract to deliver them at a certain place, that he should keep them to answer an attachment previously served on him. If a carrier should knowingly receive goods under such circumstances, it would be an act of such bad faith to his employer that he ought to be made to pay for them if he delivered them to answer the attachment. If the law required him to hold goods thus received, it is easy to imagine that he might soon receive attachments enough to stop all his business.

These views show that the judgment below ought to have been for the defendant, and save us from considering the other aspect of the case.

Judgment reversed, and judgment for the defendant below, and record remitted.

MOHNEY v. COOK.

[26 PENNSYLVANIA STATE, 342.]

NO LEGAL PROTECTION IS GIVEN TO PROHIBITED CONTRACTS, prohibited trades, or prohibited things; but persons are never outlawed, and their lawful property is under the protection of the state, even when used improperly.

PENALTIES FOR CARELESSNESS AND FOR SABBATH-BREAKING ARE TOTALLY DISTINCT, and the laws out of which they arise are distinct in all their purposes and features.

LAW RELATING TO SABBATH DEFINES DUTY OF CITIZEN TO STATE, and to the state only. One offender against law, to the injury of another, will not be allowed to set off against the plaintiff that he too is a public offender.

THAT PERSON WAS ON SUNDAY unlawfully engaged in a worldly employment does not prevent him from recovering damages against one who obstructs a navigable stream.

CASE by David Mohney and William Girtz against George Cook for injuries done to plaintiffs' boat by a dam, whereby the boat was wrecked. Defendant relied mainly on the fact that plaintiffs were engaged in a violation of the act of April 22, 1794, forbidding worldly employment on Sunday. The nature, tenor, and tendency of the material part of the judge's charge may be sufficiently gathered from the general context of the opinion as a whole. Defendant got a verdict, and the charge was assigned for error.

Phelps, for the plaintiffs in error.

Golden and Fulton, for the defendant in error.

By Court, LOWRIE, J. The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity, and we cannot be imbued with them and yet prevent them from entering into and influencing, more or less, all our social institutions, customs, and relations, as well as all our individual modes of thinking and acting. It is involved in our social nature that even those among us who reject Christianity cannot possibly get clear of its influence, or reject those sentiments, customs, and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life.

It is perfectly natural, therefore, that a Christian people should have laws to protect their day of rest from desecration. Regarding it as a day necessarily and divinely set apart for rest from worldly employments, and for the enjoyment of spiritual privileges, it is simply absurd to suppose that they would leave it without any legislative protection from the disorderly and immoral. The sentiment that sustains it must find expression

through those who are elected to represent the will of their constituents.

So far as relates to the criminality of the act which we are now to consider, the mind of the state is expressed in the law that forbids all worldly employment on the Lord's day, under a penalty of four dollars. Being a law to enforce and protect a general and most valuable custom, it is not to be subjected to a narrow interpretation. But does the law, besides the penalty which it expresses, involve another, that he who, while breaking the sabbath, suffers wrong from the act of another shall be without remedy? This would seem to be contrary to the rule that required that penal statutes shall be construed strictly as to the punishment, so that it shall not be enlarged by construction.

It is supposed, however, that this rule does not apply to this law, seeing that where contracts are made on the Lord's day the parties incur the penalty, and besides this neither of the parties can recover on the contract. But this instance falls under another rule, that executory contracts made under forbidden circumstances, or on forbidden subjects, institute no legal duty, and therefore a legal claim for a breach of duty must have some other foundation. They are not in fact void if the parties perform them in good faith. They are then executed contracts, and the state will protect title thus created against all wrong-doers: *Sanford v. Lebanon*, 26 Me. 463. An assignment for the benefit of creditors is void, so far as executory, if not recorded according to law; but valid, so far as executed, before it is objected to by any one having a right: *Stewart v. McMin*n, 5 Watts & S. 100. A deceit practiced in making a forbidden contract is remediless, because the incident goes with the principle: *Robeson v. French*, 12 Met. 24 [45 Am. Dec. 236]. So of an insurance on a prohibited voyage: *Michigan State Bank v. Hastings*, 1 Doug. 241. In such cases, if there be any relation between the parties, it depends upon the facts, and not upon the contract.

But the defense here is mainly put upon another principle, that if a man, by his own fault, contribute to the accident, he cannot recover. Even this rule has some qualifications. A sailor getting an excessive flogging for an offense, or one who gets an excessive beating in an affray begun by himself, or the excessive abatement of a nuisance, or one who is injured by a spring-gun while trespassing on another man's ground, *Bird v. Holbrook*, 4 Bing. 628, is not without remedy; for the law re-

quires him who takes upon himself the remedy of retaliation or punishment, even in cases of apparent necessity, to see that the measure of it be not excessive. Apply the same reasoning to the present case, and the defendant is not justified, for he occasioned a penalty much more severe than that of the statute.

There are, no doubt, cases wherein an injured party will be remediless because of his own fault, even when that fault does not contribute to the accident. A vessel engaged in the slave-trade, piracy, or smuggling, and injured by another, or the keeper of a gambling-house injured in his business by a neighboring nuisance, could have no remedy: not, however, because the persons are out of the protection of the law for their offenses, nor because their illegal business brought them to the place of danger, but because their business itself with all its instruments is outlawed. Prohibited contracts, prohibited trades, and prohibited things receive no legal protection; but persons are never outlawed, and their lawful property is under the protection of the state, even when used improperly.

It is very apparent, therefore, that in considering this case we must be careful in our distinctions. The fourth and eighth commandments are not confounded because a man steals on the sabbath day; and on a conviction for sabbath-breaking, we do not punish for theft. And so the penalties for carelessness and for sabbath-breaking are totally distinct, and the laws out of which they arise are distinct in all their purposes and features.

The law relating to the sabbath defines a duty of the citizen to the state, and to the state only; and hence it may be very proper for the state to refuse a remedy against itself or against any of its subdivisions, where an injury arises from bad roads, to one who is unlawfully traveling on the Lord's day: *Bosworth v. Swansey*, 10 Met. 363 [43 Am. Dec. 441]. But we should work a confusion of relations, and lend a very doubtful assistance to morality if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he too is a public offender: *Ricker v. Barry*, 34 Me. 116; *Hendrick v. Johnson*, 5 Port. 208. An insurer of a ship is not relieved from his contract because the master started on his voyage in violation of the law for the protection of sailors' rights: *Redmond v. Smith*, 7 Man. & G. 457. Nor can a buyer of spirits refuse payment because the seller violated the revenue laws in the form of the sale: *Wetherell v. Jones*, 3 Barn. & Adol. 221. A man may be punished for getting drunk, or for riding furiously along the street; and yet, if in such circumstances, and not because of

any carelessness, he fall into a ditch, the man who improperly dug it could have no excuse. A breach of duty to the state does not necessarily involve a breach of duty to the defendant in such cases, and when it does not, it is simply an irrelevant fact unless the law gives it relevancy in some express form.

The law requiring care in avoiding accidents defines a duty to individuals only. It is most frequently applied to travel upon highways of land or water; though it applies to all cases in which persons are so near together that they are liable to injure each other by accident. It recognizes the relation thus naturally arising, and declares the law of that relation to be mutual care. The rule that the party who sues must be without fault himself has no other object than to prevent such fault, in circumstances of danger, as may contribute to the injury. It does not allow a party who does not take proper care of himself in such circumstances to demand from another compensation for an injury which he may have himself occasioned.

In cases of this kind, the law does not inquire at all into the plaintiff's fault, except on proof that the defendant did the act from which the injury arises. Then if it appear that the injury was not willful, and then only, is it relevant to inquire whether the plaintiff with due care might not have avoided the injury, and this shows the only kind of fault which is admitted to silence his complaint: *McCaraher v. Commonwealth*, 5 Watts & S. 24. It must be a failure of duty under the circumstances of danger; a failure of duty to the party who caused the danger, so that it may be said that he brought the injury on himself.

We cannot see that sabbath-breaking is a fault of this description. If there is any secret and mysterious connection between such a fault and the event here complained of, then it falls under the rule, *causa proxima non remota spectatur*, for the law judges of such cases only "by the outward appearance." It is only when we can discover no human fault contributing to the accident that the law calls it an act of Providence.

It is said, however, that had it not been for the plaintiff's transgression of the law his boat would not have been at the defendant's dam when it was. True enough; and so might it be said of boats and rafts arriving at Pittsburgh on Monday—they would not have been there on Monday had they not run on Sunday, and would have been saved from a certain accident then happening to them. But when we are investigating the causes or conditions of an event, we investigate all the circumstances of the time and place, and ascertain their influence. But the time is not one of

the circumstances of itself, and time cannot be a cause of anything except figuratively.

We acquire no additional light by the suggestion that the plaintiff had no right of highway on the Lord's day, for his worldly business; for this is only asserting one of the incidental results of the law. It could just as truly be said that a man's right to his farm, or factory, or boat, undergoes a similar qualification; yet no doubt he would have redress against any one injuring them willfully or carelessly. Besides, it was not for the protection of roads, but of the Lord's day, that the law was passed, and the plaintiff could not have been punished as for an unlawful use of the road.

The maxim of the Roman law, *In pari delicto*, etc., has no influence in the case. As the Romans applied it, it is a mere logical rule that where the judgment of the law is balanced on the evidence, that suit must fail. Then, *quare non potentior sit, qui teneat, quam qui persequitur?* Dig. 45, 1, 91, 3.

It is admitted here that in a case of willful trespass this defense could not be allowed; and we may take this admission as indicating a definition of the rule. Then in any other case it will be allowed, and all freight and wages earned by or on steamboats are tainted with illegality, if partly earned on the Lord's day; no insurance covers the risks of running on that day on inland highways, and all accidents must be absolutely charged to the carriers. Perhaps if these and other consequences had been suggested to the counsel they would have accepted them; but we cannot, for this would be adding penalties to the law that were not thought of when it was passed. Important as is the day of rest for man; important as are the religious institutions connected with it, and the civilization and moral refinement that grow out of and depend upon it and its institutions; important and necessary for all man's highest and noblest aims as is the religion which on that day sends forth its strongest influence—we cannot protect it by any such latitudinarian interpretation of the law we are appointed to administer as is expected of us here.

Judgment reversed and a new trial awarded.

ACTIONS FOR INJURIES OCCURRING ON LORD'S DAY: *Bosworth v. Inhabitants of Swansea*, 43 Am. Dec. 441, and note 442; *Robeson v. French*, 43 Id. 236; *Specht v. Commonwealth*, 49 Id. 518; and see exhaustive note to *City Council v. Benjamin*, Id. 616, on constitutionality of Sunday laws.

THE PRINCIPAL CASE WAS SUMMARIZED IN *Ranch v. Lloyd*, 31 Pa. St. 369; and cited in *Scully v. Commonwealth*, 35 Id. 513, showing that in the princi-

pal case the distinction was maintained between the law or duty of the boatman and the law or duty of the keeper of the highway, when it was decided that even unlawful boating is protected against obstructions of the navigation. In *Sparhawk v. Union Passenger Railway Co.*, 54 Id. 401, it was cited to the point that we cannot supplement a defective case by an alleged infraction of the penal laws in the acts complained of. It was quoted from the principal case "that a breach of duty to the state does not necessarily involve a breach of duty to the defendant." And in *Dale v. Knepp*, 98 Id. 392, to the point that the law relating to the observance of the sabbath defines a duty of the citizen to the state, and to the state only.

POORMAN v. KILGORE.

[26 PENNSYLVANIA STATE, 365.]

IN-PAROL SALES OF LAND, ALL EVIDENCE OF VERBAL CONTRACT WILL BE REJECTED, if being taken as true it does not make out such a case as to entitle it to stand as an exception to the statute of frauds.

CONTRACTS BETWEEN PARENTS AND CHILDREN must be proved by direct, positive, express, and unambiguous evidence. The terms must be clearly defined, and all the acts necessary to a contract's validity must have especial reference to it, and nothing else.

WHERE CHILDREN WORK FOR PARENTS AFTER ARRIVING AT AGE, the law implies no contract on the part of the parent to pay for the services.

NO SALE OR GIFT CAN BE INFERRED FROM a parent giving a child the use of a farm or house, and promising a gift of the same at his (the parent's) death.

LAW WILL NOT INFER GIFT FROM PARENT TO CHILD where his acts can be readily accounted for as founded on other intentions.

IMPROVEMENTS MADE BY CHILD ON HIS PARENTS' LAND on the promise that the land would be given to him at his father's death will not take the case out of the statute of frauds.

EJECTMENT. The court below submitted the facts to the jury, and instructed them as follows: "The contract, according to Jacob Poorman, was that defendant should have the land, paying plaintiff one third of the grain and hay during his life, and after plaintiff's death defendant was to have the land absolutely, or as the witness expresses it, it was to be his. If the jury find this contract established by the proof and the other material facts we have pointed out, we then say the defendant has shown a case which is sufficient to relieve his title from the operation of the statute of frauds, and the verdict should be for him." The jury found for defendant, and plaintiff removed the cause to this court by writ of error.

Cowan, for the plaintiff in error.

Foster, for the defendant in error.

By Court, LOWRIE, J. Wherever we notice a change in the administration of legal principles, gradually progressing for a considerable period and under a series of judges, it may be very safely assumed that it has a much more legitimate foundation than that of judicial arbitrariness. This is illustrated by the practice under the statute of frauds and perjuries; and we very naturally ask, how happens it that any exceptions at all have been made to a statute so general and so peremptory in its terms, and that judges are now so much inclined to restrict the sphere of those exceptions?

However we may define that portion of the law which courts of equity take as their guide, it is very apparent that the equitable exceptions that have been made to this statute have gone upon the principle of correcting the law in that wherein it was, by reason of its universality, defective. They proceed upon the assumption that our experience furnishes no universal rules, either for legislation or jurisprudence, but only general ones. Though we give to laws the form of universality, yet they must always be subject to modification or exception, when a new experience arises to which they are not justly adapted. To regard them otherwise would be to treat them as mere arbitrary rules, and not, as they ought to be, a generalization and improvement of the results of our social experience. The demands of natural justice and the nature of our minds impose upon us the necessity of excepting out of the letter of the law those cases that are not equitably within its intention, and this necessity finds its expression and its measure in many accepted rules of interpretation.

The English statute of frauds and perjuries was passed in 1676, and was intended to change the common law theretofore existing, by which title to land could be passed by livery of seisin without writing; and to get clear of the frauds, perjuries, and subornation of perjuries, and the uncertainties of titles that had grown out of the old law. But as the customs of the country can never be suddenly and entirely broken down even by an act of parliament, it was natural that many cases should arise, founded on the old customs, where great injustice would be done unless the statute should receive an equitable interpretation; and the presumption that the legislature did not intend any innovation on the common law, further than the case absolutely required, came in aid of such an equitable interpretation as would ease off the severity of the operation of the new enactment. But exceptions founded on this principle must natu-

rally be but temporary expedients, which must die away when the new law itself has become part of the general customs of the country. We might say that there is a natural provision for this sort of indulgences in the fact that no man is perfect enough to bear a strict application of rules, and very few hearts are hard enough to enforce, without flinching, the letter of the law, when it results in upholding injustice.

When the settlement of Pennsylvania commenced, the English statute had not broken down the old customs relative to passing titles to land, and we did not at first adopt it as part of our law: *Hyam v. Edwards*, 1 Dall. 1. And when our statute was passed in 1772, of course it was necessary to treat the old customs of granting lands with the indulgence already indicated. And as with us, and on account of the small value of our lands, our customs in relation to conveyances were more loose than they had been in England: *Duncan v. Walker*, 1 Yeates, 220; *Parton v. Price*, Id. 500; *Campbell v. Lear*, 2 Id. 124, 379; *Bonnet v. Devebaugh*, 3 Binn. 187—this indulgence here was greater than theirs. But here as there it was evidently temporary, and in its very nature it presented a caution against its own permanence.

This temporary reason influenced also the recognition of the statutes providing for the recording of titles and for the limitation of actions and of liens of judgments; but it has answered its purpose, and now the only difficulty is to know how to fall back upon those essential exceptions to which all laws are in their very nature subject; because no people can bear an entirely literal and unbending application of any rule of law. We can make this regression intelligently only by carefully noticing the experience of the past, and not by ignoring and rudely rejecting all the modifications with which the statute has been applied in practice. If we attempt to gain at one bound our true position, we shall probably light beyond it. Even in seeking the correction of admitted error, our experimentations must be grounded on our experience.

A delivery of possession in pursuance of a verbal contract is now regarded as essential to the enforcement of it; but there is a plain reason why it ought not to be treated as securing that result, or as having as much force now as it once had. When livery of seisin was at common law a sufficient form of transferring title to land, it was an open and notorious act performed in the presence of the neighbors, accompanied by the symbolical delivery of the turf or twig and the declaration of the quantity

of the estate granted. But even this solemn investiture was so open to frauds and perjuries that it called for the correction of the statute requiring the contract to be put into writing. Now that common-law form has worn out, and delivery takes place without any form at all, almost always by a mere entry on a permission, express or implied; and thus the publicity and form of the delivery no longer avails as a check upon the mere invention of the sale.

In our first endeavor to administer these equitable exceptions through the instrumentality of a common-law trial, we very often failed by reason of our want of skill in applying such remedies in a form so unusual. Very often the law and the facts were committed to the jury, and out of them they made a general verdict as best they could; but experience has shown that their mental training was not at all of a kind to enable them to thread their way through all the complications of such questions, and that generally they cut the knot and decided each case according to their feelings, and not according to the laws by which titles to land are regulated. This experience has forced upon the courts a more careful study and application of equity practice, and a consequent rejection of all the evidence of a verbal contract, if, being taken as true, it does not make out such a case as is entitled to stand as an exception to the statute: *Ludwig v. Leonard*, 9 Watts & S. 49; *Kelsey v. Murray*, 9 Watts, 109; *Charnley v. Hansbury*, 13 Pa. St. 21; *Moore v. Small*, 19 Id. 461; *Rankin v. Simpson*, Id. 471 [57 Am. Dec. 663]. This improvement in the practice tends to the security of written titles, even if the exceptions to the principle of the statute remain. In the case of *Brawdy v. Brawdy*, 7 Id. 157, the judge who tried the cause heard the evidence of the verbal contract, and then withdrew it all from the jury as being entirely insufficient to make out the case, and this practice was expressly approved, though this does not very clearly appear in the report of the case, and not at all in the syllabus.

We may notice still another principle of law that is applied very beneficially to restrain the exceptions to the statute, and which is of especial importance in this case, though its application is not peculiar to cases under this statute. We allude to the law of evidence that grows out of the family relation. It is so usual and natural for children to work for their parents, even after they arrive at age, that the law implies no contract in such cases. And it is so natural for parents to help their children by giving them the use of a farm or house, and then to

call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books or utensils or rooms or houses by the names of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to the children as against each other and in subjection to their own paramount right. The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it, and nothing else: *Mehaffy v. Share*, 2 Pa. 365; *Hack v. Stewart*, 8 Pa. St. 213; *Bash v. Bash*, 9 Id. 262; *Lantz v. Frey*, 14 Id. 201; *Sanders v. Wagonseller*, 19 Id. 251; *Lantz v. Frey*, Id. 366; *McCue v. Johnston*, 25 Id. 308; *Hugus v. Walker*, 12 Id. 175. The importance of this rule is very apparent; for it requires but a glance over the cases of this class to discover how sad has been the experience of the courts in family disputes growing out of the exceptions which have been allowed to this statute; and how many and how distressing must have been the ruptures of the closest ties of kindred that have been produced and perpetuated by the encouragement thus given to try the experiment of extracting legal obligations out of the acts of parental kindness.

The arrangement out of which the present controversy arose is so entirely similar in its spirit and intention to that which appeared in the case of *McClure v. McClure*, 1 Pa. St. 376, that it ought to have been disposed of in the same way. This plaintiff had one son, Jacob, and one daughter, married to the defendant. Some nine years before the arrangement in controversy he had given his farm to his son and son-in-law to farm on the shares, they giving him two fifths of the produce. After they had farmed it a while, Kilgore moved to another place in the same county, and Jacob then farmed the whole of it on the same terms. In 1844 the plaintiff went to Kilgore to get him to come back; and here we let the witness Fetter tell the story. The plaintiff said to his son-in-law: "If he would come back he would make a man of him; he would give him the half of the farm and Jacob the other half; if he would come back and give him, while he lived, the third of all he raised, he should have the farm at his death. Jesse agreed to the proposal. The offer

was made three or four times within the year, and Jesse agreed to it every time."

Jacob testifies that the bargain, as he calls it, took place at his house on the farm. "At first he gave us the place to farm, and said we should have it after his death. He told us we should farm and go on, and we should have it and everything, and then after his death we should have it as our own. We were to give him one third of the produce." Kilgore accepted the offer and moved on the land. No division line was fixed in this so-called bargain, but the plaintiff shortly afterwards called a surveyor and directed him how to make the division, and it was done accordingly, giving Jacob one hundred and three acres and Kilgore ninety-one.

There is much evidence of the declarations of the plaintiffs; but while this may corroborate the story of the direct witnesses of the arrangement, it can change nothing of the substance of it as they narrate it. There is much evidence also of the acts and declarations of both Jacob and Kilgore, that show very plainly that they did not regard the transaction as a present and executed gift. But we may lay all this out of the question. It only confirms, as matter of fact, what we assume as matter of law from the story of the two principal witnesses—that the father was merely putting into experimental operation, for the benefit of his son and daughter, an arrangement which he expected to confirm at his death.

The bargain, as it is called, is said to have been made four or five times, and this seems absurd. If the parties had understood it as a contract, they would have lived up to it or accused each other of a breach of it. If they had understood the three or four conversations that Fetter speaks of as a bargain, they would not have made another afterwards in connection with Jacob. We take this one as the best and only proper evidence of the transaction, because it is the last. "He gave us the place to farm, and said we should have it after his death." Here is nothing but a promise to give, and that cannot be enforced. The division line was not settled by a bargain, but the father fixed it as he pleased.

The statute forbids verbal conveyances of land, and we presume that the parties did not transgress it. It is not probable that the father was putting his property entirely beyond his control in his life-time, and the terms of the arrangement do not require this inference. The delivery of possession does not demand such an inference, for it is perfectly accounted for by

the relation of the parties, and by the annual delivery of a share of the produce, as a tenancy from year to year, which is allowed by the statute. If a contract to farm land on the shares, and a delivery of possession under it, can be supplemented by another for an absolute grant, then certainly, as between parent and child, delivery of possession becomes a worthless protection against violations of the statute. Both the terms of this arrangement and the possession under it may readily be accounted for as founded on other intentions than that of a gift of the land, and therefore the law forbids us to infer that purpose: *Jones v. Peterman*, 3 Serg. & R. 546 [8 Am. Dec. 672]; *Eckert v. Mace*, 3 Pa. 365, in note; *Robertson v. Robertson*, 9 Watts, 42; *Goucher v. Martin*, Id. 109; *Rankin v. Simpson*, 19 Pa. St. 471 [57 Am. Dec. 663]; *Phillips v. Thompson*, 1 Johns. Ch. 149.

Some reliance is placed upon the improvements made by the defendant, but having been made without an actual gift, and only on the expectation or promise of a gift, they do not avert the rule of the statute: *McClure v. McClure*, 1 Pa. St. 379; *McDowell v. Simpson*, 3 Watts, 138 [27 Am. Dec. 338]; *Stewart v. Stewart*, Id. 255. They are no evidence of the gift itself, and may be fully accounted for on the expectation of it. They are estimated at two thousand dollars; but this gives no idea of the real outlay of the defendant. The only things worth naming are the house and the barn, and the only money proved to have been paid for these was under two hundred and fifty dollars. Most of the materials seem to have been got from the place. Much of the work was done by frolics, and fifty dollars of the money and some materials were furnished by the plaintiff, and the whole of it was conducted as such matters usually are in the country when a father is providing a home for his son on his own land.

The fact that since the arrangement relied on the plaintiff has married again and has another child can have no influence, except as accounting for and justifying the change of his intentions, on the same principle that a will is revoked by marriage or the birth of a child after it was written. On the defendant's own evidence, the court ought to have instructed the jury that he had no title to the land.

Judgment reversed and a new trial awarded.

LEWIS, C. J., and BLACK, J., dissented.

PAROL GIFT BY FATHER TO CHILD can be established only by clear and convincing evidence: *Collins v. Loftus*, 34 Am. Dec. 719; *Rucker v. Abell*, 48 Id. 406.

PROMISE TO PAY FOR SERVICES RENDERED BETWEEN MEMBERS OF SAME FAMILY will not be presumed: *Weir v. Weir's Adm'r*, 39 Am. Dec. 487; *Williams v. Hutchinson*, 53 Id. 301, and note thereto 306, discussing the subject. When son may recover for services, see *Price v. Price*, 34 Id. 608; see note to *Johnson v. Hubbell*, 66 Id. 773.

WHAT ACTS CONSTITUTE PART PERFORMANCE OF VERBAL CONTRACT so as to take case out of statute of frauds: See *Christy v. Barnhart*, 53 Am. Dec. 538, and exhaustive note to same on the subject; see note to *Johnson v. Hubbell*, 66 Id. 773.

CITATIONS OF PRINCIPAL CASE.—It was cited to first point in syllabus, *supra*, in *Todd v. Campbell*, 32 Pa. St. 252. In *Poorman v. Kilgore*, 37 Id. 312, that a parol contract to convey land is within the statute of frauds, and cannot be enforced by specific performance. "One who enters as a tenant of the owner is not presumed to hold adversely even after his term has expired. In all such cases, if there is a relation adequate to account for the possession, the law accounts for it by that relation unless the contrary be proved. A party who relies upon a contract must prove its existence; and this he does not do by merely proving a set of circumstances that can be accounted for by another relation appearing to exist between the same parties:" *Hertzog v. Hertzog*, 29 Id. 469. The rule is settled that as between father and child the evidence of a gift or sale must be direct, positive, express, and unambiguous, that its terms must be clearly defined, and that all the acts necessary to its validity must have special reference to it, and nothing else: *Shellhammer v. Ashbaugh*, 83 Id. 28; *Ackerman v. Fisher*, 57 Id. 459; *Harris v. Richey*, 56 Id. 399. In cases of parol sales, where the attempt is to evade the statute of frauds by converting the vendor into a trustee for the vendee by partial execution, it has repeatedly been held to be the duty of the court to reject all evidence of a verbal contract, if, in the judgment of the court, when taken as true, it does not make out such a case as would induce a chancellor to decree a conveyance: *McBarron v. Glass*, 39 Id. 135; *Washabaugh v. Entriken*, 36 Id. 517.

COX v. COX.

[26 PENNSYLVANIA STATE, 375.]

CLAIM OF EQUITABLE TITLE TO LAND BY PAROL GIFT is repugnant to and inconsistent with a claim of equitable title to the same land arising from the payment of purchase money, and a defense setting up both such titles will be rejected.

EQUITY DOES NOT LEND ITS AID TO EXPERIMENTS ON LEGAL TITLES in favor of those who can present no distinct and consistent claim.

DEFENDANT MUST ELECT BETWEEN TWO CONTRADICTORY DEFENSES, and evidence should be permitted only in support of the one on which he determines to rely.

POSSESSION OF LAND BY SON with legal title in his father does not tend to prove an equitable title in the son, either by reason of a parol gift or payment of purchase money.

THAT IMPROVEMENTS WERE MADE BY SON ON LAND of which his father holds the legal title is not evidence of a gift of the land.

PARDON CANNOT BE PROVED BY COPY OF EXECUTIVE MINUTES certified by the secretary of the commonwealth. Either the pardon or a certified copy should be produced.

EJECTMENT. The defendant, William Cox, jun., called on David Reed in 1835 and made a parol bargain for the purchase of the land in question. Shortly afterward William Cox, sen., defendant's father, called on Reed, paid him six hundred and twenty-five dollars, and took a deed from him to William Cox, esq., for the land. William Cox, jun., then built a house and barn on the land and moved on to it, had it assessed to him, paid the taxes, and continued to reside thereon until the commencement of this action. In 1851 William Cox, sen., died, and the plaintiffs, James Cox and others, and the defendant, are his heirs at law. Plaintiffs claim six sevenths of the land as such heirs. Defendant claimed to hold upon two grounds: 1. Because he furnished the purchase money when the land was bought; and 2. Because his father had made an absolute gift of the land to him by turning over to him the title deeds (the names being the same), and he had paid taxes and made permanent improvements in pursuance of the gift and possession. There was abundant evidence to show that William Cox, sen., looked upon the land as belonging to his son. On the trial, defendant offered the deposition of one Kepner. It was objected to on the ground that Kepner had been a convict. Defendant then produced a copy of the executive minutes certified by the secretary of the commonwealth, to show that pardon had been granted Kepner. This was objected to as incompetent, but was admitted. The jury found for the defendant. Plaintiff appealed.

Hepburn and Casey, for the plaintiffs in error.

Woods and Doty, for the defendant in error.

By Court, LOWRIE, J. This is another of that illegitimate or suspected brood that is continually being hatched out of the exceptions to the statute of frauds, and giving rise and permanence to family feuds. Much that we have said in *Poorman v. Kilgore*, 26 Pa. St. 365 [*ante*, p. 425], is so relevant here that we can refer to that opinion without repeating it. This case, however, presents one feature that was not in that, and we dispose of it now as first in order.

The defendant relies on two inconsistent equitable titles: one being that the land was bought for him with his own money, and

that therefore the equitable title resulted to him, though the legal title was in his father; and the other that the land was a gift to him by his father. His defense is a claim in equity for specific performance of the trust or gift, by transferring to him the legal title; how, then, does he stand in court?

He says, in effect, My father has the only title that in strict law can be taken notice of, but he ought in equity to convey it to me. I do not exactly know why he ought to do so; but he bought it for me with my money, or he gave it to me, I cannot say which. Both cannot be true; but I ask the court to hear me try to prove both, and to give me the conveyance on the ground which I shall come nearest to proving, or to give it to me because some of the jury may say one, and some the other, is the true ground, and because, therefore, neither of them is found true.

Such a claim, if distinctly set out, would be rejected on first presentation; it is only when its incongruity is covered up in a mass of conflicting evidence that it could be suffered to pass. The essential grounds of his claim are evidence that he has no honest claim at all. If this land was given to him, or bought for him with his money, he must have known it, and which way it was. To say both, is false. To say that he does not know which, is to admit that neither is true. In his own opinion, one of them may be true, and only one, and on that he must rely. Equity does not lend its aid to experiments on legal titles in favor of those who can present no distinct and consistent claim. It sanctions no war of which the manifesto is false on its face.

This cause must therefore go back for a new trial, and for this reason we have desired to decide whether there is any sufficient evidence of either claim to justify a decree for a specific performance; but we cannot. The defendant's claims are contradictory of each other, and so is his evidence, and we cannot possibly say how it will appear when he elects to stand upon a claim that will have the appearance of sincerity. We must therefore limit ourselves to an indication of the principles of evidence which are distinctly raised by the case as it was tried, to the exclusion of those which have only a probability of arising.

Though the father and son were both of the same name, yet it seems too plain for doubt that the father bought and paid for the land, and took the deed to himself. That he wanted to let the son have the use of it fully accounts for all the other facts connected with the purchase. If the son claims that in equity

it is his, he must elect and prove one or the other ground of his claim. In one case the gift, in the other the purchase with his money, must be shown. The furnishing of the money for the purpose, or the gift of the land, one or the other of these is the principal fact of his case, and without it all else is worthless; and if it could be conveniently done, all else ought to be excluded until the principal fact should sufficiently appear, and this must be by evidence going directly to the fact: Hill on Trustees, 94.

The possession of the land by the son does not tend to prove either of them, for this is sufficiently accounted for by the relationship of the parties. The payment of the taxes is quite as worthless, for sons always pay the taxes of the land of which their father gives them the use, or they ought to do so. If it was taxed in the son's name, this is fully accounted for by the use, and moreover this is the proper form of taxation when the son, and not the father, is to be personally charged with the tax. That the son had, or probably had, means to buy land, does not tend to prove that he did buy any, or furnished the money to do it. If these facts were clearly the other way, they would be strong evidence against the son's claim, because they would be in direct hostility to it; but none of them are inconsistent with a use by the son of the land of his father.

The fact that the other sons were on other farms of their father's and paid rent for them, while this son paid none, is fully accounted for by the state of this farm when the defendant got it, and by his own evidence here that it was not worth over thirty dollars a year, and that he did not raise enough to keep him. Without this, it is certainly no evidence of the principal fact—the gift, or the furnishing of the money—though it might, if otherwise unaccounted for, tend to corroborate legitimate evidence of such principal fact.

Nor do improvements tend directly to establish the principal fact; and such improvements as are in evidence here would have the very smallest weight as corroborating evidence of it. A small frame house, a log barn, and two log, one-story, slab-roof cabins erected with the assistance of the father, and principally of materials got on the place, constitute the whole of them; and their value, even as corroborating evidence, seems to be more than counterbalanced by the miserable state in which he kept the place. If valuable and careful improvements are some evidence corroborative of a claim to more than a mere estate at will, then careless cultivation and merely essential

improvements must be evidence the other way, unless when accounted for by the laziness of the tenant.

When a father puts his son on a farm with the expectation of giving it to him some day, the son is not like to an ordinary tenant at will; for his relationship to the owner places him in a higher position, not as to the legal title, but as to his hopes, and consequently as to his inducements to improve. We naturally expect him to deal with the place very differently from what a stranger would do. He improves it because he expects that the justice of his father will give him the benefit of his improvements; and in making them he is almost always aided by his father and the rest of the family, without any accounts being kept; and this shows very clearly their family character, and excludes them from the supervision of the law. In the very nature of these family transactions, such improvements are not evidence of a gift of the land; and no matter how unjustly a father may seem afterward to have acted to his son, or how unfortunate it may be for him that his father died without carrying out his intentions, we cannot correct the mischief by giving the son the land. Mischief though it be, it is slight and temporary compared with the evils which would be caused to families if the law should hold out inducements to litigation as a means of correcting such parental errors.

Let the family bond and relations stand as sacred as is possible against the intermeddling of the state. It is the fundamental institution upon which the state, as a social organization, depends; and if this, by its legislation or jurisprudence, gives encouragement to family strife, it begets demoralization in the very elements of its own life. If it should test the acts and intercourse of the family by the same rules as it does those of strangers, then the family relation is struck down when the law comes in to judge; and there must be the same circumspection and mistrust in the intercourse of parent and child as there is between strangers. If we have not intelligence enough to appreciate the value and the duty of union of act and feeling, either in church or state, let us at least respect the family instinct so far that we may always have this single element of social union to fall back upon when inclined to despondency on account of the wide and multiplied divisions to which society is subject.

The error in the evidence of Kepner's pardon being admitted will be avoided on the next trial.

Judgment reversed and a new trial awarded

LEWIS, C. J., and BLACK, J., dissented.

EQUITY WILL NOT INTERFERE WHERE LEGAL REMEDY EXISTS, as a general rule: *Andrews v. Sullivan*, 43 Am. Dec. 53.

DOUBLE DEFENSES: *Judy v. Kelley*, 50 Am. Dec. 445; *Cunningham v. Smith*, 60 Id. 333.

POSSESSION AS EVIDENCE OF TITLE: *Plume v. Seward*, 60 Am. Dec. 599, and copious note on the subject 601.

PARDONS: See comprehensive note on the subject to *State v. McIntire*, 59 Am. Dec. 572.

THE PRINCIPAL CASE WAS CITED IN *Hertzog v. Hertzog*, 29 Pa. St. 469, to the point that "one who enters as a tenant of the owner is not presumed to hold adversely, even after his term has expired. In all such cases, if there is a relation adequate to account for the possession, the law accounts for it by that relation, unless the contrary be proved. A party who relies upon a contract must prove its existence; and this he does not do by merely proving a set of circumstances that can be accounted for by another relation appearing to exist between the parties."

KAUFFMAN v. GRIESEMER.

[26 PENNSYLVANIA STATE, 407.]

IT IS NOT ERROR FOR COURT TO OMIT TO CHARGE ON EVERY POSSIBLE ASPECT OF FACTS, especially when uninvited by the party complaining.

SUPERIOR OWNER MAY IMPROVE HIS LANDS BY THROWING INCREASED WATERS UPON HIS INFERIOR, through the natural and customary channels, but the principle should be prudently applied.

SUPERIOR OWNER HAS NO RIGHT TO DIG NEW CHANNELS and cause increased flow of water through them upon his inferior's land.

INFERIOR OWNER IS NOT OBLIGED TO RECEIVE ON HIS LAND WATERS which nature never appointed to flow there, and may dam up a channel cut for the carrying of such waters to and upon his land.

CASE for obstructing a watercourse. The opinion states the facts.

Banks and Strong, for the plaintiffs in error.

H. W. Smith, for the defendant in error.

By Court, WOODWARD, J. This was an action of trespass on the case, in which the plaintiffs complained that the defendant had obstructed an ancient watercourse, whereby water was thrown back upon their lands to their injury. The parties own adjoining lands, and some thirty or forty rods above the dividing line is a strong spring on the land of the plaintiffs, the natural outlet of which is in the direction of the defendant's land. This outlet, having rising ground on both sides of it, serves to carry off not only the water of this spring, but also the water from rain and snow which fall on some six hundred acres of land,

property of the plaintiff and others. At a very early period in the history of Berks county a public road was laid out across the outlet near the spring, with a small bridge, composed of logs and plank, over the outlet, leaving a water-way underneath. The bridge was repaired from time to time, and the passage under it cleared of rubbish, and finally a plank trunk was put in to conduct the water under the bridge. Some few years since the public road was vacated, and then the father of the plaintiffs took out the trunk and opened a passage for the water. Some witnesses speak of the spring as a natural pond covering half an acre of ground, and others say that formerly they mowed grass growing where the pond has been known of late years. Whether it was a reservoir by nature, or made so by the embankments of the public road and the partial obstruction of the outlet, is not an ascertained fact in the case. The attention of the jury was not directed to it, and no point was submitted on the subject which enables us to infer how they may have regarded it. But whether the customary flow from this natural or artificial pond was into the defendant's land was a very important inquiry as affecting the rights of both parties. It was made a prominent question on the trial. Put to the jury as it was, we are obliged to regard the fact as found, that no water ever reached the defendant's land through this channel except in freshets, until the ditch was dug, for the obstruction of which this suit was brought. There was evidence that made it the duty of the court to submit this question, and which justified the jury in finding as they did; but it is complained of on the part of the plaintiffs that in determining the customary flow the court did not direct the attention of the jury to the state of the ground before the old road was built.

Doubtless the ancestor of the plaintiffs had a right, after vacation of the old road, to remove it altogether, and restore the premises to the state they were in before the road was built. If the effect of exercising this right was to give the water its original but long-suspended flowage, and thereby cause it to penetrate the defendant's land, which during the partial obstruction of the road it had failed to reach, it was a very important conclusion of fact, and should have been ascertained and established. But if plaintiffs' counsel thought there was evidence to establish it, they doubtless presented it in argument to the jury; and if they wished the court to charge upon it, they should have called on them by an appropriate point to do so. It is not error for a court to omit to charge on every possible

aspect of the facts, especially when uninvited by the party complaining. So far as the judge dealt with the facts, he presented them fairly. The witnesses, to whose testimony he referred, spoke of the flow of the water as they had known it. If their memories were not older than the road, this was not their fault, and it was no reason why the court should withhold their testimony from the jury. If there was evidence that proved a different state of waters before the road was built, the court said nothing to damage the effect of it, and the plaintiffs had the benefit of it; but not having invoked judicial comment upon it, they have no reason to complain that judicial comment was withheld.

Taking it, then, as an established fact that the ordinary flow of water from the plaintiffs' spring did not reach the defendant's land, though tending towards it, did he do anything to obstruct the floods and freshets that were accustomed to flow there? Most certainly he did not, for the court told the jury that "to prevent the waters of floods and freshets flowing where they were accustomed to flow, the defendant could have no right. Any obstruction to any such waters would give the plaintiffs the right of action." Was this sod dam an obstruction of any such waters? In finding for the defendant, the jury answered this question in the negative.

But if the defendant did not obstruct the only water that was accustomed to flow into his land, for what is he sued? It appeared from the testimony of Nathaniel Bertolette, a witness called on both sides, that from a point in the plaintiffs' field, about seventeen rods north of the division fence, there was an ascent of several inches to the fence, and in twenty-two feet from the fence south into Griesemer's land, an elevation of ten inches more. This perhaps accounts for the fact that the water only of floods and freshets reached Griesemer's land. Whether the ordinary flow wasted itself by absorption or evaporation, or was consumed in irrigation of the fifty acres of plaintiff's meadow, it did not visit the defendant's land, and from the topography of the place it was physically impossible that it should. But to compel it to go there, a ditch was dug, which, according to one witness, extended at least twelve feet into Griesemer's land. Finding that the water thus introduced was injurious to his crops, Griesemer built the sod dam across the ditch at the line fence, and this is the wrong complained of.

Almost the whole law of watercourses is founded on the maxim of the common law, *Aqua currit et debet currere*. Because water is descendible by nature, the owner of a dominant or su-

perior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior. Hence the owner of a mill has an easement in the land below for the free passage of water from the mill in the natural channel of the stream, accompanied with the right to enter the land for the purpose of clearing out the stream, and removing obstructions to the free flow of the water: *Prescott v. Williams*, 5 Met. 429 [39 Am. Dec. 668].

This easement is called a servitude in the Roman law, and consists, says Pardessus, in the subjection of the inferior heritage towards those whose lands are more elevated to receive the waters which flow from them naturally, and quoting the code civil, he adds, "This obligation applies only to waters which flow naturally, without any act of man;" those which come either from springs, or from rain falling directly on the heritage, or even by the effect of the natural disposition of the places, are the only ones to which this expression of the law can be applied. It is not, however, to be understood, he goes on still further to say, that because the flow of water must not be caused by the act of man, that therefore the proprietor who transmits water to the inferior heritage is not permitted to do anything on his own land—that he is condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law intends not this; it prohibits only the emission into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow.

Hence, for the sake of agriculture—*agri colendi causa*—a man may drain his ground which is too moist, and discharging the water according to its natural channel, may cover up and conceal the drains through his lands; may use running streams to irrigate his fields, though he thereby diminishes, not unreasonably, the supply of his neighbor below; and may clear out impediments in the natural channel of the streams, though the flow of water upon his neighbor be thereby increased.

I am aware that in *Merritt v. Parker*, 1 Coxe, 460, Chief Justice Kinsey denied these principles, and held that by no contrivance and under no pretense can one man cause to flow over the land of another a greater quantity of water than it is naturally subjected to; but on the other hand, there is a Maryland case of equal authority, *Williams v. Gale*, 2 Har. & J. 231,

which in its facts bears a striking resemblance to the case at bar, and the case of *Martin v. Riddle*, 26 Pa. St. 415, note, decided by my brother Lowrie, in the district court of Allegheny county, and affirmed in the supreme court at September term, 1848. These cases recognize the principle that the superior owner may improve his lands by throwing increased waters upon his inferior through the natural and customary channels, which is the most important principle in respect not only to agricultural but to mining operations also.

It is not more agreeable to the laws of nature that water should descend than it is that land should be farmed and mined; but in many cases they cannot be if an increased volume of water may not be discharged through natural channels and outlets. The principle, therefore, is to be maintained; but it should be prudently applied. This court refused to apply it as among several owners of city lots, each of whom, it was held in *Bentz v. Armstrong*, 8 Watts & S. 40, must so regulate and grade his own lot as that the water which falls or accumulates upon it shall not run upon the lot of his neighbor. It was greatly misapplied by the plaintiffs when they supposed they might not only increase the ordinary flow, but might dig a new channel for it to and into the defendant's land. If from the natural disposition of the place a basin was formed on the plaintiffs' land, some seventeen rods short of the defendant's, from which the water flowed upon the defendant only in time of floods or freshets, the defendant was the superior owner in respect of that place in all ordinary times, and it would be a reversal of the principles stated to subject him, against his consent, to an artificial channel that would deprive him of the advantages of his position. If his land was higher than that basin, he had a right, except in high water, to have the rains and snows run from his land on to the plaintiffs'. *Aqua currit et debet currere*.

The plaintiffs had no right to insist upon his receiving waters which nature never appointed to flow there; and against any contrivance to reverse the order of nature, he might peaceably and on his own land take measures of protection. The sod dam, if indeed it ever had a substantive existence, of which the counsel on neither side were able to convince themselves, was, in this view of the case, an innocent and lawful erection. It was not setting up a nuisance against a nuisance any more than the shutting the door against an unwelcome visitor is a nuisance. The only servitude the plaintiffs could claim in the defendant's land was that it should receive the overflow which was natural

and customary, and the court throughout their charge guarded this right. There was no invasion of it by the defendant, and he was not therefore liable in damages. The elevation which protected him in ordinary times could not be reduced without his consent, and when the undue liberty was taken, he was not a wrong-doer in protecting himself from the consequences.

The judgment is affirmed. —

FAILURE TO GIVE INSTRUCTIONS UPON PARTICULAR POINT is no ground of exception to a verdict, unless the party excepting requested the judge so to instruct: *Moses v. Boston & Maine R. R.*, 64 Am. Dec. 381, and cases cited in note 393.

OWNER OF DOMINANT TENEMENT MAY CONSTRUCT ARTIFICIAL DITCHES and canals to improve his land, or prepare it for agriculture, but in so doing, must conform as nearly as possible to the course of the natural drains: *Lattimore v. Davis*, 33 Am. Dec. 581. As to what owner of dominant tenement may not do, see *Martin v. Jett*, 32 Id. 120. For discussion of easement as to water rights, see extended note to *Elliott v. Rhett*, 57 Id. 763; see also *Wheatley v. Chrisman*, 64 Id. 657, and note 661; *Overton v. Sawyer*, 62 Id. 170.

SERVITUDE TO RECEIVE FLOW OF WATER: See copious note to *Martin v. Jett*, 32 Am. Dec. 123.

CITATIONS OF PRINCIPAL CASE.—It is not error for a court to omit to charge in every possible aspect of a case when uninvited by the party complaining: *Stokes v. Burrell*, 3 Grant Cas. 242; *Knoll v. Light*, 76 Pa. St. 272. For doctrines similar to those of the principal case, see *Miller v. Laubach*, 47 Id. 155.

LOUDEN *v.* BLYTHE.

[27 PENNSYLVANIA STATE, 22.]

MARRIED WOMAN MAY CONVEY OR MORTGAGE HER LAND by joining her husband in a deed for that purpose, but to make such deed valid, it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with a full knowledge of its meaning, purpose, and intent, and that her will was perfectly free, and that her mind accorded with the act.

DEED OF MARRIED WOMAN IS VOID IF HER HUSBAND USES HIS INFLUENCE AND POWER OVER HER in such manner as to control her unduly, and make her act under his will, and not her own.

MARRIED WOMAN'S DEED, TO BE VALID, MUST SHOW THAT IN EXECUTION there was no imprisonment of her mind nor advantage taken of her weakness, and she must have acted voluntarily and without compulsion, either physical or moral; and the only way these facts can be proved is by a magistrate's certificate that he examined her separate and apart from her husband, that he made the contents of the deed fully known to her, and that she declared her execution of it to be voluntary and free from any sort of coercion.

MAGISTRATE'S CERTIFICATE OF ACKNOWLEDGMENT OF DEED BY MARRIED WOMAN, reciting an examination separate and apart from her husband,

and that the execution was voluntary and free from coercion on the part of her husband, is conclusive in favor of one who accepted it in good faith, and paid his money without knowing or having any reason to doubt its truth; but if such certificate be false in fact, and the grantee knew it, or knew of circumstances which would put an honest and prudent man upon inquiry, then it may be contradicted by parol evidence.

ACKNOWLEDGMENT OF DEED BY MARRIED WOMAN IS VOID if the evidence shows that the examination was in the presence of her husband, that the wife was not properly informed as to the nature of the transaction, or that she was under the influence of fraud or coercion.

DECLARATIONS OF MARRIED WOMAN MADE WHILE DEED WAS BEING PREPARED, of her unwillingness to execute it, though not made in the presence of the grantee, are admissible as part of the *res gestæ* to show the invalidity of the execution of such deed.

EJECTMENT. The facts and evidence in this case are substantially the same as in *Louden v. Blythe*, 55 Am. Dec. 527. On the trial of the present action, the defendants proposed to give in evidence declarations of Mrs. Blythe, one of the defendants, to a witness while the instrument in controversy was being written, and whilst the parties were together, respecting her willingness to execute it and her intentions in that regard, such declarations not being made in the presence of the grantee. The evidence was admitted against plaintiff's objection, and he took an exception. She also offered to prove that the mortgage in question was executed in consequence of Loudens's importunity. This was also admitted against plaintiff's objection, and he excepted. The charge referred to in the opinion states the propositions of law substantially as laid down in the opinion. The remaining facts appear in the opinion.

McConaghy, and M. and W. McLean, for the plaintiff in error.

McCleary, for the defendant in error.

By Court, BLACK, J. The land in dispute was the separate estate of a married woman. Her husband is now dead, and this ejectment against her is brought on a mortgage purporting to have been executed and acknowledged jointly by herself and her husband while he was living. She alleges that the mortgage is void as against her, because she executed it under the influence of imposition and coercion.

A married woman may convey or mortgage her land by joining with her husband in a deed for that purpose. But to make such a deed valid, it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with a full knowledge of its meaning, purpose, and intent. It must

also be shown that her will was perfectly free, and that her mind accorded with the act. If he uses his influence and power in such manner as to control her unduly, or so as to make her act under his will, and not her own, the deed is void. I do not say that it will be vitiated by the mere fact that she yields to his persuasions even when she does so against her better judgment. But there must be no imprisonment of her mind, and no unfair advantage taken of her weakness. She must act voluntarily, and not by compulsion, moral or physical. These facts are to be proved in one way only—that is, by the certificate of a judge or justice, that he examined her, not in the presence of her husband, but separately; that he made the contents of the deed fully known to her; that she declared her execution of it to be voluntary and free from every sort of coercion. Such a certificate is conclusive in favor of a grantee, who has accepted the deed in perfect good faith, and paid his money, without knowing or having any reason to suspect that it is untrue. But if it be in point of fact false, and if the grantee knew it to be false, or if knowledge can be brought home to him of any circumstance which would put an honest and prudent man upon inquiry, then it may be contradicted by parol evidence. When the certificate of the acknowledgment is overthrown by proof that the examination of the woman was made in the presence of the husband, that she was under the influence of fraud or coercion, or that she was not properly informed of the nature of the transaction, it goes for nothing, of course.

The charge of the court below embodied these principles. Whosoever will compare that charge with the opinion of Judge Gibson in *Schrader v. Decker*, 9 Pa. St. 14, and that of Judge Chambers in *Louden v. Blythe*, 16 Pa. St. 532 [55 Am. Dec. 527], will see that the learned judge of the common pleas followed the highest authority. The last-named case arose on this same mortgage, between the same parties, and was another ejectment for the same land. The evidence was somewhat stronger against the mortgage on the former trial than it appears to have been on the last; but there was no such difference in the facts as to require the solution of any new legal questions. The jury found that the examination was not separate; that Mrs. Blythe's execution of the mortgage was not voluntary, and that Loudon knew it. We are of opinion that these facts were found on evidence which justified the verdict. We think, also, that none of the exceptions to evidence have been sustained.

Judgment affirmed.

ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN: See *Livingston v. Kettelle*, 41 Am. Dec. 179-184, note, where the subject is discussed at length, and see also *Hughes v. Lane*, 50 Id. 436, note 444; *Mason v. Brock*, 52 Id. 490, and note 493; *Jordan v. Corey*, Id. 516; *Louden v. Blythe*, 55 Id. 527, and note 533, being the case referred to in the opinion, and arising out of the same facts and instrument as the principal case; *Hartley v. Frosh*, Id. 772; *Warren v. Brown*, 57 Id. 191. As to the effect of the certificate of acknowledgment of married woman's deed, and facts recited therein, see *Jamison v. Jamison*, 31 Am. Dec. 536, and note 541.

THE PRINCIPAL CASE IS CITED IN *Michener v. Cavender*, 38 Pa. St. 337, *McCandless v. Engle*, 51 Id. 313, and *Kocourek v. Marak*, 54 Texas, 206, to the point that parol evidence is admissible to show fraud or duress in the execution and acknowledgment of a deed by a married woman. In *Biggers v. St. Louis House Building Co.*, 9 Mo. App. 212, it is cited to the effect that a *prima facie* case of invalidity of certificate of acknowledgment of deed by a married woman cannot be made out on her unsupported evidence of the falsity of its recitals.

HUDSON'S APPEAL.

[27 PENNSYLVANIA STATE, 46.]

AFTER JUDGMENT RECOVERED BY ONE PARTY IN HIS OWN NAME, AND PAYMENT OF SAME TO HIM, another person who claims a portion of the sum recovered cannot have a trial of his right thereto by moving the court in which the judgment is entered to direct the payment of such portion to him, and that the judgment be marked for his use to that extent, and jurisdiction would not be conferred upon the court to decide the matter in that way by agreement of the parties to consider the money in court for the purpose of the motion, nor would the fact that the money was actually in court alter the application of the rule.

UNSATISFIED JUDGMENT MAY BE MARKED BY COURT FOR USE OF EQUITABLE CLAIMANT so as to give defendant notice not to pay it to the legal plaintiffs, but such determination would not be conclusive, especially on third persons, and the facts in such case, whether proved or admitted, are not part of the record, and no appeal lies from the order of the court allowing or refusing a motion to so mark a judgment.

MOTION to mark a judgment recovered by and paid to one party for the use of another. The opinion states the facts.

Franklin, for the plaintiff in error.

Stevens, contra.

By Court, BLACK, J. Emma Hudson has a judgment against the Pennsylvania Railroad Company, which she recovered in her own name, and, as she asserts, in her own right; but Mary Hudson alleges that the half of it is hers. The appellant's statement of the case says that the money has been paid, but it does not appear to whom. We presume it was not paid to the sher-

iff, for there was no execution; not into court, for no officer of the court, as such, had any legal authority to receive it; and not to Mary Hudson, for she is no party to the suit. It must have been paid to Emma Hudson, the legal plaintiff, or (which amounts to the same thing) to somebody else who had power to receipt for it as her agent. Under these circumstances, the remedy of Mary Hudson was perfectly plain. She might have brought an action for money had and received. But she merely went into the court, where this satisfied judgment was standing, and moved that payment to her of one half the money be ordered, and the judgment marked one half for her use. This is a mode of recovering debts totally unknown to the law. The agreement to consider it in court gave no jurisdiction; nor would the case be stronger if it had been actually and bodily there. If my neighbor has a sum of money of which I claim a share, we cannot bring it before a judge and demand partition. We may, indeed, appoint him an arbitrator; but no such thing appears to have been thought of in this case. The court on whose record a judgment stands unsatisfied may protect the interests and rights of an equitable claimant by marking it for his use, so as to give the defendant notice not to pay it to the legal plaintiff. But the determination of such a motion would not be final—it might be changed on fresh evidence; it would not estop the immediate parties, if the same question should arise again in another suit; certainly it would not be conclusive on third persons. Whatever be its effect, it is very clear that we cannot review it. The record does not bring up anything but the motion itself, and the allowance or refusal. The facts, whether proved or admitted, are not part of the record. There is no analogy between this and a proceeding to distribute money collected by the sheriff on execution. That is a regular proceeding in equity, instituted for the protection of the sheriff, in place of the numberless actions which would otherwise have to be brought against him. The evidence comes up with the record, the decree is binding on all the world, and the right of appeal is given by statute to every one who is interested. On the whole, we are of opinion that the refusal of the court below to mark the judgment one half for the use of Mary Hudson is not a decree from which an appeal lies to this court; and that if the claim which Mary Hudson makes be a just one, she has an ample remedy by due course of law, from which she is not precluded by anything which has yet occurred.

Appeal quashed.

STEACY v. RICE.

[27 PENNSYLVANIA STATE, 75.]

UNDER RULE IN *SHELLEY'S CASE*, IF TESTATOR DEVISE TO TRUSTEE AND HIS HEIRS certain real estate for the separate use of testator's daughter, then a married woman, during her life, and after her death to her heirs in fee-simple, and the daughter afterwards become discoverd, she has an estate in fee-simple which will pass by deed to her alienee.

USE EXECUTED BY STATUTE IS LEGAL ESTATE TO ALL INTENTS AND PURPOSES, as much as if it had been given by the instrument creating the estate, without the intervention of a trustee.

RULE IN *SHELLEY'S CASE* DOES NOT APPLY WHERE ESTATES GRANTED ARE OF DIFFERENT QUALITIES, as where lands are given in special trust for the life of one person, and after his death in general trust for the heirs of the same person, the latter use being within the statute of uses, and the former not.

SPECIAL TRUSTS ARE NOT WITHIN STATUTE OF USES, and a trust to hold for the separate use of a married woman is special; if the woman becomes sole, the special trust for her separate use ceases, and the legal estate vests fully in her.

DEVISE TO TRUSTEES FOR PARTICULAR PURPOSE vests legal estate in them as long as the execution of the trust requires it, and no longer.

EJECTMENT. The opinion states the facts.

Frazer and Kline, for the plaintiff in error.

Stevens and A. Herr Smith, for the defendants in error.

By Court, BLACK, J. The testator devised to a trustee and the heirs of the trustee all his real estate in Strasburg, for the separate use of his daughter (a married woman) during her life, and after her death he gave and devised the same real estate to the heirs of his said daughter in fee-simple. The will was dated in 1805 and proved in 1810. The daughter became a widow in 1821, and died in 1851, leaving as her heirs two grandsons, of whom the plaintiff below is one. In 1847 she conveyed the land in fee to the defendant below, who has possession, and claims title under the deed. The plaintiff claims as devisee of the remainder under the will of his great grandfather.

According to the rule in *Shelley's Case*, the daughter had an estate in fee-simple. But the plaintiff contends that it is not within that rule, because the life estate to the daughter is equitable and the remainder to the heirs legal. If this be true in point of fact, it is sound in law, for the two estates cannot unite as an estate of inheritance in the first taker unless they are both of the same quality.

The legal fee is devised to the trustee. It is given to him

and his heirs, and comprehends the whole estate. By the terms of the will, there was devised to the heirs an equitable remainder after the determination of the equitable life estate given to their ancestor. The trustee took the legal estate for the use of the testator's daughter during her life and for the use of her heirs afterwards. But for the heirs it was a mere dry trust, and the remainder was executed in them as a legal estate under the statute of uses. A use executed by the statute is a legal estate to all intents and purposes, as much as if it had been given by the instrument creating the estate without the intervention of a trustee. Where lands are given in special trust for the life of one person, and after his death in general trust for the heirs of the same person, the latter use being within the statute, and the former not, the estates are of different qualities, and the rule in *Shelley's Case* cannot apply. Such precisely was the case of *Lady Jones v. Lord Say and Seal*, 1 Eq. Cas. Abr. 383, where the word "heirs" was held for that reason to be a word of purchase, and not of limitation. The remainder in this case was therefore legal, and if the life estate was not also legal, the opinion of the common pleas that the first taker had but a life estate was right.

Special trusts are not within the statute of uses; and a trust to hold for the separate use of a married woman is special: *Harton v. Harton*, 7 T. R. 652. If, therefore, the testator's daughter had died during her coverture, this case would have been clear enough. But her husband died in 1821. When she became sole the trust for her separate use ceased; it was no longer a special trust, and the legal estate vested fully in her. It was held by this court in *Mark v. Mark*, 9 Watts, 410, that where an estate was devised for the use of children, there being a special trust until the youngest came of age, the children acquired the legal title when that event happened. This is in accordance with the doctrine in England, where it is laid down in *Ross v. Parker*, 1 Barn. & Cress. 360, as a general rule, that when an estate is devised to trustees for a particular purpose the legal estate vests in them as long as the execution of the trust requires it, and no longer.

Here, then, we have the case of a devise giving an equitable estate for life to one person, and remainder, also equitable, to her heirs. But the remainder immediately became an executed legal estate in the heirs, while the life estate was executed not immediately, but some time afterwards. Both were legal estates at the time of the first taker's death, and at the time of her conveyance in fee to the defendant. Does this state of things leave the case within the exception which says that

the two estates cannot unite unless they be of the same quality? It is somewhat curious that no direct authority can be found on this point. A *dictum* of Lord Hardwicke in *Spencer v. Bagshaw*, 2 Atk. 270, has been cited to the effect that nothing which happens after the death of the testator can change the estates of the devisees. But that case can hardly be considered as authority, for it has been in effect overruled by several later decisions, and it has not stood the test to which the criticisms of the text-writers have subjected it: Fearne on Cont. Rem. 121; Hays' Ent. Tab. 2, No. 47; 2 Kent's Com. 219. Besides, Lord Hardwicke was speaking of changes produced by the acts of the parties which made a question not at all analogous to this.

This is not a question of interpretation, in which the object is to get at the meaning of the testator. If it were, and if the will afforded us no other means of judging, we might consider the difference in the qualities of the two estates, though existing only for a time, as a strong argument for the plaintiff. But we are considering the application of a rule of law—a rule which often disregards the intention, however clearly expressed. We have no doubt what was meant by this will. Like ninety-nine in a hundred of the cases to which the rule in *Shelley's Case*, has been held to apply, it was the purpose of the testator to give the first object of his bounty a life estate merely. But the law will not treat that as an estate for life which is essentially an estate of inheritance, nor permit any one to take in the character of heir unless he takes also in the quality of heir. It does not stand with the interest of the state that lands so devised should be tied up from alienation during the life of the first taker and the minority of his heirs.

It is to be observed that this case is literally within the rule as laid down by the judges in *Shelley's Case*. The testator's daughter took an estate for life under the will, and in the same instrument there is a limitation of the fee to her heirs by way of remainder. The life estate she took was legal after the special trust had ended, and there was then nothing in the quality of the two estates to prevent them from uniting. I have said that a use executed under the statute is a legal estate. Can it make any difference that it was not executed immediately, if it was executed at all within the period of its duration? I cannot see why it should. Chancellor Kent, 2 Com. 215, says the rule applies whether the ancestor takes the freehold by express limitation, by resulting use, or by implication of law. His name will perhaps establish any legal proposition not opposed by the

judicial authorities; and if he be right in this, it is manifest that the words of Lord Hardwicke have been understood by the plaintiff's counsel in too broad a sense.

On the whole, we are of opinion that the testator's daughter, having taken under the will what became after the death of her husband a legal estate for her life, and the remainder in fee being also legal, and limited to her heirs by the same instrument, the two estates united and became a fee-simple estate in her, which therefore she had good right to convey at the date of her deed to the defendant.

Judgment reversed, and judgment here for the plaintiff in error (who was the defendant in the common pleas), with costs of suit.

LOWRIE, J., delivered the following concurring opinion: This is a devise to one in trust for the separate use of the testator's daughter, a married woman, during her life, and then to her heirs in fee. The daughter became single, and then she and her daughter and only child joined in selling it. She outlived her daughter, and died leaving grandchildren, and one of them is now claiming that the deed of his mother and grandmother could convey only an estate for the life of his grandmother. Is it so?

Strike out the trust, and it is a devise to one for life with remainder to her heirs, which is plainly a fee-simple. Now, the trust was struck out by an event involved in the nature of the gift—that is, when the testator's daughter became sole; for then its purpose had been satisfied, and after that the trust stood for the sole benefit of a single woman, and was immediately executed by the statute of uses, and became a legal estate in her.

This is therefore an estate in trust for the daughter during coverture, with remainder to her for life, and remainder in fee to her heirs. It is a gift of a legal freehold to her and them, in the same will, a limitation of the fee to her heirs, which makes a fee-simple in her: *Hileman v. Bouslaugh*, 13 Pa. St. 351 [53 Am. Dec. 474]. And we need not say what would be the effect if the estates were of different qualities. When, therefore, she sold the land to Steacy she had full right to sell.

RULE IN SHELLEY'S CASE, WHEN AND WHERE OPERATES: See *Ware v. Richardson*, 56 Am. Dec. 762, and cases cited in note 781.

STATUTE OF USES, EFFECT TO EXECUTE USE AND TO VEST LEGAL TITLE: See *Chapman v. Glassell*, 48 Am. Dec. 41; *Moore v. Schultz*, 53 Am. Dec. 448, and note; *Ware v. Richardson*, 56 Id. 762.

DEVISE IN TRUST TO WOMAN, WHAT PASSES BY, EFFECT OF MARRIAGE, AND OF SUBSEQUENT DEATH OF HUSBAND: See *Whichcote v. Lyle's Ex'rs*, 28 Pa. St. 87; *Bush's Appeal*, 33 Id. 87; *McKee v. McKinley*, Id. 93; *Kay v. Scates*, 37 Id. 37; *Barnett's Appeal*, 46 Id. 406; *Freyvogel v. Hughes*, 56 Id. 230; *Megargee v. Naglee*, 64 Id. 218; *Estate of Harris*, 3 Phila. 327, where the principal case is cited and followed on this point.

GERMAN v. GERMAN.

[27 PENNSYLVANIA STATE, 116.]

LIFE ESTATE IN PERSONAL PROPERTY GIVES DONEE RIGHT TO CONSUME the same where it cannot be used without consuming it, or to wear it out where it cannot be used without so doing.

LIABILITY OF LIFE TENANT OF PERSONALTY OVER TO REMAINDERMAN is governed by the intention of the donor, as manifested by the instrument which evidences the gift.

WHERE LIFE ESTATE ONLY IN PERSONALTY IS GIVEN, AND REMAINDER IS GIVEN OVER TO OTHERS, the representatives of the donee for life should account for the value of the property according to the principles of the civil law, as adopted by the courts.

INTENTION OF TESTATOR IN MAKING BEQUEST IS TO BE ASCERTAINED, not from particular clauses of the will, but from the whole instrument; and where seemingly repugnant clauses appear, the last is to be regarded as expressing his final design on the subject.

PROVISION IN TESTATOR'S WILL, GIVING TO HIS WIDOW PRIVILEGE TO CHOOSE AND KEEP DURING HER WIDOWHOOD "all such personal property as she may think proper," and directing that "all such property as may then be left" shall be sold by his executors, entitles the widow to such property without security for such articles as may be consumed or disposed of during her life or widowhood; but under such a bequest the widow is not entitled to take money in testator's possession at his death, nor chooses in action.

ACTION ON AGREED CASE, between the widow of a testator as plaintiff and the executors under testator's will as defendants, to determine what will pass to plaintiff under certain bequests in said will. The further facts appear in the opinion.

Merrill, for the plaintiff in error.

Slenker, for the defendant in error.

By Court, LEWIS, C. J. Personal property is so transitory and destructible in its nature that a right to enjoy it during life necessarily carries with it privileges which do not belong to the grant of a life estate in land. A life estate in personal property undoubtedly gives the donee a right to consume such articles as cannot be enjoyed without consuming them, and a right to wear

out by use such as cannot be used without wearing out. But the extent of liability over to the remaindermen is to be governed by the intention of the donor, as manifested in the instrument which evidences the gift. It is in general a just rule, that where a life estate only is given, and the remainder is given over to others, the representatives of the donee for life should account for the value of the property according to the principles of the civil law as adopted by the courts: Just. Inst., b. 2, tit. 4; Domat., pt. 1, b. 1, sec. 989; Civ. Code La., art. 542; Frederician Code, pt. 2, b. 4, tit. 5, sec. 3; *Holman's Appeal*, 24 Pa. St. 178. Where the parties claim under a will, the intention of the testator is to be collected, not from particular clauses, but from the whole instrument; and where seemingly repugnant clauses appear, the last is to be regarded as expressing his final design on the subject.

By the will of John German, his wife Barbara was to have "the privilege to choose and keep during her natural life or widowhood all such personal property as she may think proper." If this clause was the only one in the will bearing on the question, the widow's estate might be held to some measure of accountability for the articles used, consumed, or disposed of during her life. But nothing is given over at her death except "such property as may then be left." When it is considered that the testator professed an intention to dispose of his whole estate, the implication seems clear that the widow's representatives were not to be held accountable for anything beyond the articles "left" at her death. Any other construction by which a claim upon her estate is reversed would leave her husband intestate as to such claim; and this is manifestly contrary to his intention.

But the personal property which the widow is at liberty to choose does not include money in possession or choses in action. The clauses of the will directing the sale of the articles not selected by her, as well as those which may be left at her death, show that the testator in this part of his will did not intend to embrace any other than such articles as are usually sold by executors for the payment of debts and for the purpose of distributing the proceeds. The note of Peter German, ninety-eight dollars and four cents, and the cash for wheat sold, two hundred and twenty-one dollars and nine cents, must therefore be deducted from the amount claimed by the plaintiff in error, and judgment should be entered in her favor, without security of any kind for the residue.

Judgment reversed, and judgment entered here in favor of the plaintiff in error for one thousand nine hundred and seventy-nine dollars and thirty-four cents, with costs, subject to the agreement to be released upon delivery of the articles and payment of costs by the defendants.

LIFE ESTATE OR INTEREST IN PERSONAL PROPERTY.—Strictly speaking, there can be no life-estate in personal chattels, as estates are an incident only of real property: 1 Schouler on Personal Property, 17; Williams on Personal Property, 259 et seq. But a life interest may be created, and it is now held that chattels may be limited over by way of remainder after a life interest in them is created, though not after a gift of the absolute property, such interests being generally created by will, though it is said that they may be created by deed: 2 Kent's Com. 352 et seq.; *Manning's Case*, 8 Co. 95; *Lampet's Case*, 10 Id. 46; *Child v. Baylie*, Cro. Jac. 459; *Longworth v. Chadwick*, 13 Conn. 42; *Powell v. Brown*, 1 Bailey L. 100; *Smith v. Cleber*, 2 Vern. 59; *Hyde v. Parrat*, 1 P. Wms. 1; *Tissen v. Tissen*, Id. 500; *Pleydell v. Pleydell*, Id. 748; *Porter v. Tournay*, 3 Ves. jun. 311; *Moffat v. Strong*, 10 Johns. 12; *Westcott v. Cady*, 5 Johns. Ch. 334; *Griggs v. Dodge*, 2 Day, 28; *Taber v. Packwood*, Id. 52; *Scott v. Price*, 2 Serg. & R. 59; *Deihl v. King*, 6 Id. 29; *Royal v. Eppos*, 2 Munf. 479; *Mortimer v. Moffatt*, 4 Hen. & M. 503; *Logan v. Ladson*, 1 Desau. 271; *Geiger v. Brown*, 4 McCord, 427; *Brummett v. Barber*, 2 Hill (S. C.), 543. It is said that if a limitation in remainder after a life estate in personalty be not by executory devise, it can only be made by conveyance in trust: *Betty v. Moore*, 1 Dana, 237. In North Carolina it has been held that a remainder in chattels after a life estate cannot be created by deed: *Morrow v. Williams*, 3 Dev. 263. Estates-tail cannot be created in personal property, and the very words which would create such an estate in realty will pass an absolute estate in chattels: *Seale v. Seale*, 1 P. Wms. 290; *Chandless v. Price*, 3 Ves. 99; *Brouncker v. Bagot*, 1 Meriv. 271; *Tothill v. Pitt*, 1 Madd. Ch. 488; *Garth v. Baldwin*, 2 Ves. 646; *Jackson v. Bull*, 10 Johns. 19; *Patterson v. Ellis*, 11 Wend. 259; *Moody v. Walker*, 3 Ark. 147.

A life interest in personal property is regarded as in many respects analogous to the usufruct of movables under the civil law. They are either wholly consumed or at least impaired by use, depending on the nature of the articles. The person entitled to the use has the right to enjoy and use all the movables according to their nature; the things to be consumed become his absolute property; things not to be consumed may be put to the use for which they were designed, without abusing them; and after the time for such use has elapsed, to be yielded in the condition in which they happen to be after the usufruct has expired: *Holman's Appeal*, 24 Pa. St. 174. If the bequest of a life interest in a thing to be consumed happens to be of the specific articles themselves, as of corn, hay, fruits, and the like, the absolute property will pass: *Randall v. Russell*, 3 Meriv. 194; *Evans v. Inglehart*, 6 Gill & J. 171; *Henderson v. Vault*, 10 Yerg. 30; but if not specifically given, but given generally as goods and chattels, the tenant for life is bound to convert such articles into money, and save the principal for the remainderman, the life tenant having the use or income during his life: *Patterson v. Devlin*, 1 McMull. 459; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Fearn v. Young*, 9 Id. 549. Under the old chancery doctrine, the remainderman, after a life estate in personalty, could call for security from the tenant for life that the

estate would be forthcoming at his death, for equity regarded his tenancy merely as a trust for the remainderman; but this practice has now been generally overruled, though it is held in some cases that security may still be required where there is real danger that the property may be wasted, secreted, or removed: *Anonymous*, 2 Freeman, 206; *Dracken v. Bentley*, 1 Rep. Ch. 59; *Foley v. Burnell*, 1 Bro. C. C. 279; *Sutton v. Craddock*, 1 Ired. Eq. 134; *Mortimer v. Moffatt*, 4 Hen. & M. 503; *Gardner v. Harden*, 2 McCord Ch. 32; *Smith v. Daniel*, Id. 143; *Merril v. Johnson*, 1 Yerg. 71; S. C., 1 Hill Ch. 44; *Henderson v. Vaulx*, 10 Yerg. 30; *Hudson v. Wadsworth*, 8 Conn. 348; *Langworthy v. Chadwick*, 13 Id. 42; *Homer v. Shelton*, 2 Met. 194. *De Peyster v. Clendenning*, 8 Paige, 295, declares the New York rule, which is, in case of a specific bequest for the legatee, to give to the personal representative of the testator an inventory of the articles bequeathed, stating his possession of them, and that when his interest expires they are to be delivered up.

INTENTION OF TESTATOR AS GATHERED FROM ENTIRE WILL MUST GOVERN in construction thereof: *Stoner & Barr's Appeal*, 45 Am. Dec. 608; *Euskin's Appeal*, Id. 641. Where clauses in a will are irreconcilable, the last is adopted as the latest expression of the testator's desire: *Newbold v. Boone*, 52 Pa. St. 174; *Horwitz v. Norris*, 60 Id. 287. The rule laid down in the principal case, in regard to construing a gift by will of a certain portion of the proceeds of all sales of testator's property, is followed in *Heineman's Appeal*, 92 Id. 100. In *Myer's Appeal*, 48 Id. 29, the principal case is cited to the point that a gift by will of personal property does not include choses in action.

COXE v. GIBSON.

[27 PENNSYLVANIA STATE, 160.]

PERSON WHO HOLDS DEFECTIVE TITLE TO PROPERTY MAY PERFECT SAME BY PURCHASE AT TAX SALE, if he stands in no relation of trust to, and is implicated in no fraud against, the owner.

EJECTMENT by Coxé against Gibson and Hathaway. Plaintiff shows regular chain of title from the commonwealth to himself. Defendants gave in evidence a deed from the treasurer of the county to one Oviatt; an assignment from Oviatt to one Freeman; a conveyance by Freeman to one Newlands, and from Newlands to one Felt, and from Felt to defendants. They also gave in evidence a deed to the lands from one Smith, the county treasurer, to William Williams, on a sale for taxes; and also an assignment of such deed to defendants. The lower court ruled that the land became vested in defendants by this latter deed. This was assigned as error.

L. D. Wetmore, for the plaintiff in error.

Johnson, for the defendants in error.

By Court, WOODWARD, J. It seems to us that the Williams title was unimpeached, and the court did well to rest their judgment on that. Williams bought at the request of Felt, who had acquired the suspicious title of Freeman before; but there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes. It is a very common remedy for defective titles. Williams then held a good title in trust for Felt, and he conveyed it to the defendants. Had there been anything to implicate Felt with the Freemans—if he had sustained the same relation to Coxe which they did—his measures to perfect his title might have inured to Coxe's benefit; but for aught that appears of record, he was under no obligations to Coxe, and was as free to acquire title to the land as any other man.

The errors assigned have not been sustained, and the judgment is affirmed.

STRENGTHENING TITLE BY PURCHASE AT TAX SALE.—The subject of strengthening title by purchase at tax sale is fully discussed in the note to *Blake v. Howe*, 15 Am. Dec. 684 et seq. The doctrines there laid down are substantiated by subsequent decisions. It is held that one whose duty it is to pay taxes cannot acquire or strengthen title by purchase at tax sale: *Dunn v. Snell*, 74 Me. 22; *Williamson v. Russell*, 18 W. Va. 612; *Lewis v. Ward*, 99 Ill. 525; *Christy v. Fisher*, 58 Cal. 256. Such purchase is regarded only as a payment of the taxes: *Middleton Sav. Bank v. Barcharach*, 46 Conn. 513; *Johnston v. Smith*, 70 Ala. 108. Equity regards a tenant purchasing a tax title as trustee for his landlord's benefit: *Waggener v. McLaughlin*, 33 Ark. 201. One who is receiving the rents and profits of land, and who, therefore, is bound to keep down the taxes, does not strengthen his title by such purchase: *Hunt v. Gaines*, Id. 267. The fact that an agent at a tax sale purchases land upon which he holds a mortgage, and is therefore entitled to pay the taxes, will not invalidate his principal's title acquired by such purchase: *Jury v. Day*, 54 Iowa, 573. A purchase by a part owner at a tax sale, where he is liable for the tax, will not strengthen his title: *Choteau v. Jones*, 50 Am. Dec. 460. A tenant in common cannot acquire a tax title by purchase at tax sale as against his co-tenants: *Davis v. King*, 87 Pa. St. 261; and this rule applies as well to the grantee of a co-tenant: *Tice v. Derby*, 59 Iowa, 312. A mortgagor cannot acquire a tax title against a mortgagee: *Dunn v. Snell*, 74 Me. 22; *Home Sav. Bank v. Boston*, 131 Mass. 278. A party who is relieved from his duty to pay taxes, either for past or future years, may acquire a tax title: *Shoup v. Central Branch U. P. R. Co.*, 24 Kan. 547. A person holding a judgment lien for taxes may purchase the land at a tax sale and acquire thereby a tax title: *Morrison v. Commerce Bank*, 81 Ind. 335. One in possession of land not under a claim of title may purchase a tax title and assert it against any one, there being no fiduciary relation to require the rule of estoppel in such case: *Seaver v. Cobb*, 98 Ill. 200.

IRONS v. MCQUEWAN.

[27 PENNSYLVANIA STATE, 196.]

PLAINTIFF HAVING JUDGMENT RIPE FOR EXECUTION HAS VESTED RIGHT TO SUCH PROCESS, with all the legal incidents thereof, of which he cannot be deprived by a judge's order at chambers, and made without notice or hearing.

JUDGE MAY STAY EXECUTION UPON SHOWING OF GOOD AND SUFFICIENT GROUNDS, but this should be with a stipulation that the lien of the execution be preserved.

JUDGE HAS NO POWER TO ORDER EXECUTION RETURNABLE BEFORE DAY NAMED IN WRIT, and such order is void for want of jurisdiction, and if the order is made, such execution, on redelivery to the sheriff and rescission of the order, is entitled to priority over others issued subsequent to them, and before the order was made.

FEIGNED issue to determine the right to money raised by sheriff's sale. The opinion states the facts.

L. D. Wetmore, for the plaintiff in error.

Johnson, for the defendants in error.

By Court, WOODWARD, J. A plaintiff having a judgment ripe for it has a vested right to execution process, with all the legal incidents of such process; and if he can be deprived of this right or its incidents by the fiat of a judge, without notice or a hearing, then his judgment may be stricken out of existence, or any other property taken from him by the same means. An argument which will sustain the right and power of a judge to do the one would justify him in doing the other.

This plaintiff Irons had a right to the *fi. fa.* which he issued on the fifth of March, 1855—the law allowed it, and the court awarded it. Returnable by express command at the next term of the court, it became a lien on the defendant's goods the moment it passed into the sheriff's hands. Now, a judge could not alter the return day, either to hasten or retard it. No more could he deny the plaintiff the incidental right of lien. Both were fixed by law, and both were beyond his reach, for the law is higher than its ministers. What were his powers? He might for adequate cause shown, and upon due notice to the plaintiff or his attorney, suspend the functions of the writ, that is, delay its execution, until the new matter alleged could be inquired of and passed upon by the court that awarded it. This would impair no right which had vested, for until a sale of the defendant's goods the plaintiff has only a lien upon them, and that by virtue of his writ, and not of the levy. I do not say

what is the effect of a judge's order staying execution without an express stipulation that the lien shall be preserved. Possibly it may be a valid order, and possibly the lien is not preserved unless there be such a stipulation; but the point ruled is that it is the duty of the judge to see that it is preserved. He has power to impose terms, and if a stipulation for continuance of lien be necessary, let him see that it is made.

That the judge transcended his powers in this case is obvious. On the application of the defendant and his attorney, who was also the attorney for subsequent execution creditors, and without notice to the plaintiff or his attorney, Judge Stanton directed "the *fi. fas.* now in the hands of the sheriff to be returned on the above-stated judgment until next term, and all proceedings stayed in the mean time." Such an order was void for want of jurisdiction. It is attempted to be supported on the authority of *Commonwealth v. Magee*, 8 Pa. St. 240 [44 Am. Dec. 509], which was an action against a sheriff's sureties for the amount of an execution returned in pursuance of a judge's order that proceedings be stayed until the second day of next term. That case went very far in holding an *ex parte* order of a judge a justification of the sheriff, but let it stand as an authority for what was adjudged. It does not touch this case. The question here is not upon the liability of the officer, but upon the vitality of the process, and it arises, not upon an order to stay proceedings, which was a mere suspension of the faculties of the writ, but upon an order to return it, which was to extinguish its powers. Such an order, without notice, and without stipulation as to lien, is unsupported by authority, and violative alike of rules of practice and the rights of property. When a court of competent jurisdiction has solemnly awarded an execution returnable to the next term, with the incidental right of lien, no judge of that court, whether president or associate, can, at chambers, in this summary manner reverse the award and make the writ returnable presently to the destruction of the lien.

The consequence of this doctrine is, that when the judge rescinded the order, and the writ went back before the return day into the sheriff's hands, its life, not even suspended by a void order, dated from the time the sheriff first received it. The sheriff had it in his hands when he sold the goods on the thirtieth of March, 1855, and it was the prior lien upon them because first issued, and because it was unaffected by the improper liberties taken with it. The plaintiff in the feigned issue had, therefore, the best right to the fund in court.

The decree of distribution is reversed, and the record remanded, that distribution be made first to Gideon Irons, and then to the other execution creditors according to the order of their liens.

JUDGE, POWER TO STAY EXECUTION AT CHAMBERS: See *Commonwealth v. Magee*, 49 Am. Dec. 509. In *Chaffee v. Michaels*, 31 Pa. St. 284, the principal case is cited to the point that a stay of execution by a single judge at chambers is void for want of jurisdiction.

O'DONNELL v. MULLIN.

[27 PENNSYLVANIA STATE, 199.]

JUSTICE OF PEACE ISSUING EXECUTION ON JUDGMENT WITHIN TIME ALLOWED FOR APPEAL must revoke the execution if the appeal is afterwards taken.

CONSTABLE IS BOUND TO RETURN EXECUTION AND PROCEED NO FURTHER when notified that an appeal has been entered in the cause and the execution thereby superseded.

CONSTABLE WHO PERSISTS IN SELLING PROPERTY of a defendant on an execution after notice that it has been superseded by reason of an appeal from the judgment is a trespasser as much as if he had no process in his hands.

PURCHASER AT CONSTABLE'S SALE UNDER EXECUTION which has been revoked by reason of an appeal acquires no title.

JUSTICE OF PEACE, AND NOT CONSTABLE, IS PROPER PARTY to determine whether appeal is regularly taken, and the constable cannot refuse to recognize it on the ground that the justice committed an error.

REPLEVIN to recover a mare. Defendant O'Donnell in an action confessed judgment for a certain amount due the plaintiff. The justice entered the judgment and issued execution. Defendant then entered bail and took an appeal. The justice notified the constable thereof, but as he had levied the execution and advertised the sale, he refused to stop the sale or return the execution, but sold the property, and the defendant here became the purchaser. Plaintiff here then brought this action to recover the property.

Graham, for the plaintiff in error.

J. N. Purviance and Bredin, for the defendant in error.

By Court, BLACK, J. If a justice of the peace issues execution on a judgment within the time allowed for an appeal, and the appeal is taken afterwards, it is the duty of the justice to revoke the execution.

When the justice notifies the constable that an appeal has been entered, and the execution superseded, the constable is bound to return the execution and proceed no further upon it.

If the constable persists in selling the defendant's property under an execution thus superseded, he is a trespasser as much as if he had no process at all in his hands.

The appeal strikes the execution dead, and everything done afterwards in the way of levy or sale under it is void. A purchaser, therefore, at the constable's sale takes no title.

It is the business of the justice, not of the constable, to determine whether the appeal is regularly taken or not. If the justice allows it, the rights which it gives to the party cannot be lawfully withheld from him by the constable, on the pretense that the justice committed an error.

Judgment affirmed.

SHERIFFS, DUTIES AND LIABILITIES OF, WHEN EXECUTION SUPERSEDED: See *Hopkinson v. Sears*, 39 Am. Dec. 236. The principal case is cited in *Cope's Appeal*, 39 Pa. St. 287, to the effect that a return of execution because of the taking of an appeal revokes the execution and destroys the lien thereof.

MILLER v. REED.

[27 PENNSYLVANIA STATE, 244.]

ANY MATERIAL ALTERATION OF COMMERCIAL PAPER is fatal to a recovery upon it if unaccounted for by him who holds it.

COMMON-LAW DISTINCTIONS BETWEEN INSTRUMENTS JOINT AND THOSE JOINT AND SEVERAL were extinguished by the assembly acts of April 6, 1830, and April 11, 1848, in Pennsylvania, in the class of cases provided for by those statutes.

ALTERATION OF NEGOTIABLE NOTE EXECUTED BY TWO PERSONS, BY INTERLINING words "or either of us," is not such a material alteration, in Pennsylvania, as will avoid the note.

COMMON-LAW DISTINCTION BETWEEN JOINT AND JOINT AND SEVERAL CONTRACTS was always with regard to the remedy, and the discharge of one by taking action against the other is the peculiarity which the Pennsylvania statute takes away.

FORGERY AVOIDS INSTRUMENT, BUT TO CONSTITUTE ALTERATION OF INSTRUMENT FORGERY, it must have been fraudulent and to the prejudice of another.

ASSUMPSIT. The opinion states the facts.

G. P. Hamilton and Miller, for the plaintiff in error,

J. I. Kuhn, for the defendant in error.

By Court, WOODWARD, J. It is too well settled to be questioned that any material alteration of commercial paper, unaccounted for by him who holds it, is fatal to it. The maker of a note cannot be expected to account for what may have happened to it after it left his hands; but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it: *Simpson v. Stackhouse*, 9 Pa. St. 188 [49 Am. Dec. 554].

But was the alteration in this case material? It consisted, if indeed it was an alteration, in interlining the words "or either of us." The note was a printed form with the blanks filled up with the pen, and the interlineation bears every appearance of having been written by the same hand and at the same time as the other written parts, but still it is an interlineation, and makes the paper a joint and several, which without it would have been a joint, note. The payee and indorsee being both dead, the plaintiff, the personal representative of the latter, has no means of accounting for it, and if the words were inserted after the note was delivered, and are material, that is, if there be any longer in Pennsylvania a legal difference between a joint note and a note joint and several, the defense must prevail.

The acts of assembly of the sixth of April, 1830, and the eleventh of April, 1848, Purdon, 466, seem to have been intended to obliterate the common-law distinctions on this subject, and being remedial statutes, are to be liberally construed: *Moore v. Hepburn*, 5 Pa. St. 401.

The classes of cases provided for by them are: 1. Where suits are brought against joint and several obligors, copartners, promisors, or indorsers of promissory notes, in which process is not served on all the defendants, and judgment is taken against such as are served, the others are still liable in another action, and the judgment obtained is no bar to the subsequent proceeding; 2. In all cases of amicable confession of judgment by one or more of such debtors, the judgment shall not bar the action against the others who do not confess; 3. Where judgment is recovered against one or more of several copartners, or joint and several obligors, promisors, or contractors without the non-joinder of the others pleaded in abatement, it shall not bar a subsequent suit against any one who might have been joined; 4. The death of one of such debtors after a joint judgment shall not discharge his estate real or personal, but the personal representatives shall be liable as if the judgment had been several against the deceased alone.

The terms of this legislation, though limited to undertakings that are "joint and several," are applicable to contracts that are joint and not several: *Lewis v. Williams*, 6 Whart. 268; *Moore v. Hepburn*, *supra*. If, then, neither an action and recovery against one joint debtor, nor a confession of judgment by one, nor the death of one after judgment, works a discharge of the other, what difference remains, so far as regards the remedy between joint contracts and contracts joint and several? The distinction always had regard to remedies. The parties are bound according to the tenor of the instrument to which they put their signatures, and it is evidence against each of them; but the discharge of one by taking action against the other is the peculiarity which the statutes have taken away.

If it be said that one case, that of a joint defendant dying pending the action, is not provided for by these acts of assembly, it must be admitted; but the effect of that event is the same on a joint and several contract as on one simply joint: *Walter v. Ginrich*, 2 Watts, 204, in which Judge Sergeant stated the rule thus: The holder of a joint and several bond may elect to bring a separate action against each obligor, or a joint action against all. If he proceeds by separate actions, the executor of a deceased defendant, as well as the survivor, continues liable, but if he joins all the parties, and one of them dies pending the suit, the remedy against the assets of the deceased is terminated, and the survivor alone is responsible. This is all that could be predicated of the death of one of two defendants pending an action on an obligation strictly joint, so that whilst in respect to statutory remedies this is a *casus omissus*, it is not a ground of distinction between joint and joint and several contracts. Nor do the rules of pleading and evidence, which make it necessary to bring a joint suit on a joint undertaking, cause a difference in the effect of the two classes of contracts.

I do not conceive that the qualification in the fifth section of the act of 1848, in regard to pleas in abatement, is material, for though that section provides only for cases where there is no plea in abatement, the first section of the act of 1830 covers "all suits now pending, or hereafter brought." Besides, the language of the fifth section, the qualification included, relates as well to joint and several as to joint undertakings. These acts of assembly, it seems to me, have taken away distinctions that were always embarrassing, and sometimes insuperable obstacles to the course of justice. There was no difference in the duty before, and none in the remedy now. The moral obligation is not

affected by the words "joint and several," and in Pennsylvania at least, the legal liability is not.

If the words "or either of us" were therefore surreptitiously inserted in the note, making that a several which else had been a joint contract, neither the moral nor legal effect of the instrument was changed, and the alteration was consequently immaterial. Both Reed and Christy were bound to pay, and for aught that appears, both participated in the consideration. Nay, Reed, the objecting defendant, may have been the principal debtor, and if so, there is great equity in the statute that deprives him of a sharp and technical defense. Forgery avoids an instrument; but forgery is the fraudulent alteration of a writing to the prejudice of another. Reed was not prejudiced by this alteration, and therefore the note should have been admitted in evidence.

The judgment is reversed and a *venire de novo* awarded.

MATERIAL ALTERATION OF NOTE RENDERS IT VOID: See *Eddy v. Bond*, 36 Am. Dec. 767; *Humphreys v. Guillow*, 38 Id. 499; *Inglish v. Breneman*, 41 Id. 96; *Wilson v. Henderson*, 48 Id. 716, and note 718; *Clark v. Eckstein*, 62 Id. 307. The principal case is cited in *Robertson v. Hay*, 91 Pa. St. 247, to the point that when the alteration is not material it is of no effect. *Heffner v. Wenrich*, 32 Id. 425, is distinguished from the principal case, in that the former is a case of the alteration of the date in a note, and is material. In *Neff v. Horner*, 63 Id. 330, the principal case is cited to the point that the burden of disproving an alteration in a note is on the holder of the note.

THE PRINCIPAL CASE IS CITED in *Bowman v. Kirtler*, 33 Pa. St. 112, and *Kauffman v. Fisher*, 3 Grant, 303, to the point that the Pennsylvania acts have abolished all distinctions between joint and joint and several contracts, so far as the remedy to enforce them is concerned.

MYERS v. KEYSTONE MUTUAL LIFE INSURANCE COMPANY.

[27 PENNSYLVANIA STATE, 268.]

WIDOW MAY MAINTAIN ACTION ON POLICY OF INSURANCE EFFECTED FOR HER BENEFIT by her husband although there is an executor.

THOUGH INSURANCE POLICY EXPRESSLY REQUIRES COUNTERSIGNING BY AGENT OF COMPANY, where the intention to execute it is sufficiently plain it may be dispensed with.

INSURANCE COMPANY IS NOT LIABLE ON POLICY, where its agent agreed with a person on terms of insurance, subject to ratification by the company, and the company issued a policy on different terms, forwarding the same through the agent to the insured, with a request for its return if he did not comply with its terms, which policy he retained, but without complying with its terms.

ACTION on an insurance policy by the widow of the insured, such policy being issued on his life for her use. The husband of plaintiff took out a policy, and before its expiration, desiring to increase the risk, agreed with the agent of the company on certain terms of insurance for such larger risk, subject to ratification by the company. The company declined to ratify such agreement, but issued through its agent a policy on different terms for such increased risk, notifying him at the same time that if he did not wish to comply with the terms of such policy he should return it. He retained the policy, but failed to comply with its terms. The remaining facts appear in the opinion.

Shaler and Stanton, and Hepburn, for the plaintiff in error.

Williams, for the defendant in error.

By Court, LOWRIE, J. Though we incline to think that this action is rightly brought in the name of the person for whose benefit the insurance was effected, yet under the view that we take of the case, this is not material.

We incline also to the opinion that, notwithstanding the express terms of the policy, the countersigning by the agents is not under all circumstances essential. On an equitable interpretation of the whole transaction, it may become the duty of the court to dispense with a portion of the forms of contract, if it can find any reliable substitute for them, on the principle that cures defective execution of powers, where the intention to execute is sufficiently plain.

This contract was to be complete when delivered by the agents of the defendants, and we regard the countersigning by the agents as the appointed evidence of its proper delivery. If we do not find this evidence, we must treat it as not delivered, unless we have other evidence which we can regard as equivalent. It seems to us that a final delivery by letter, being also by writing, may be treated as equivalent; and this brings us to the question, Was there such a delivery? If not, of course there was no perfect contract between the parties. At this point millions of money may depend upon a farthing or a signature or a word; for so long as the parties differ by a farthing, the contract is imperfect and establishes no relation.

Was there a final delivery? Here we must refer to the letter accompanying the policy. It shows that the company had not accepted the terms which had been arranged between Myers and the agents, but had prepared a policy on different terms. Of course, therefore, Myers had as yet made no contract. His

proposal was not accepted, but another proposal in the shape of a new policy was sent to him, and his acceptance of this proposal, according to its terms, was essential in order to give it the character of a contract. He was told in the letter that the new terms "require the whole of the premium to be paid in cash, which if you don't wish to comply with, you can return this policy, and we will return to you the amount paid us with your notes;" and he was further informed that there was "a balance yet due on the first payment of two dollars and fifty-seven and one half cents."

This, therefore, was very plainly a conditional, and not final, delivery; a proposal, and not a contract. It was to be a final delivery as a contract if Myers agreed to it, accepted the new terms, returned the old policy, and paid the balance; and we have no evidence that he did either, except by his retention of the new policy; which certainly is no evidence of the return of the old one or of the payment of the balance, and cannot possibly be called an acceptance so long as any single thing remained open for dispute or treaty, or anything to be done by him remained undone. The learned judge of the district court was therefore right in declaring in substance that there was no binding delivery of the policy, and this affirms the judgment without the other points, and we must not discuss them.

Judgment affirmed.

THE PRINCIPAL CASE IS CITED in *Girard Fire Ins. Co. v. Field*, 45 Pa. St. 134, S. C., 3 Grant Cas. 332, to the point that an action of debt is sustainable on an insurance policy; in *Eclectic Life Ins. Co. v. Farenkrug*, 68 Ill. 468, and in *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 542, to the point that a parol agreement is not admissible to contradict or change a policy. In *Foster v. Gile*, 50 Wis. 612, it is cited to the effect that a wife has an interest in her husband's life insurance policy, which on her death descends to her heirs.

DUGAN v. BRIDGE COMPANY.

[27 PENNSYLVANIA STATE, 803.]

PROVISO OR SAVING CLAUSE IN STATUTE IS NOT TO HAVE EFFECT where repugnant to the purview or body of the act; but this rule does not apply to acts constituting private corporations, for the proviso in such cases is to be taken as an essential condition of the compact between the public and the corporation.

ACT OF INCORPORATION IS COMPACT BETWEEN PUBLIC AND CORPORATION, and the rights of the latter thereunder are only such as the very terms of the enactment confer, and any ambiguity therein must operate against the corporation and in favor of the public.

LEGISLATIVE FRANCHISE TO BUILD BRIDGE OVER NAVIGABLE STREAM, with a proviso that it shall not impair or obstruct the navigation, if accepted by a corporation, is taken *cum onere*, and must be enjoyed subject to the condition.

NAVIGATION OF STREAMS IS PUBLIC INTEREST AND FAVORED RIGHT, and obstructions thereof are public nuisances.

CONDITION IN CHARTER AUTHORIZING CORPORATION TO BUILD BRIDGE OVER NAVIGABLE STREAM, that it "shall not injure, stop, or interrupt the navigation," is not complied with by building the bridge in such manner as will do as little injury as possible to the navigation as it existed when the bridge was built; and if the structure at any time during its continuance actually injures, stops, or interrupts the navigation, the company is liable to the party injured for the damages thereby sustained.

CONDITION IN CHARTER TO BUILD BRIDGE, NOT TO INJURE NAVIGATION, is not limited to the kind and amount of trade on the stream at the time of the enactment, but extends to the increased business incident to the expansion of commerce and growth of the country.

CORPORATION HAVING CHARTER TO BUILD BRIDGE, CONDITIONED THAT NAVIGATION SHOULD NOT BE OBSTRUCTED thereby, is not responsible for an obstruction occasioned by artificial causes created by third persons; but if occasioned by natural causes, influenced in their operation by the piers of the bridge, the corporation would be liable for the consequential damage flowing from their act, as much as if the act itself had, without an intermediate agency, occasioned the injury.

WHETHER BRIDGE OVER NAVIGABLE STREAM CONSTITUTES PUBLIC NUISANCE OR NOT is a question which can only be determined by indictment at law, or a bill in equity, to be prosecuted in either case at the instance of the public authorities.

CASE to recover damages for loss of a coal-boat which was wrecked against defendants' bridge, plaintiff alleging such bridge to be a nuisance, and an obstruction to navigation of the river. The remaining facts appear in the opinion.

Burke and Watson, for the plaintiff in error.

Williams and Shaler, for the defendants in error.

By Court, WOODWARD, J. The franchise conferred on the defendants was a right to erect and maintain a toll-bridge across the Monongahela at Pittsburgh, and involved necessarily the right to build piers in the bed of the river, but it was coupled with a condition, very distinctly expressed in the proviso, that the company should not erect the bridge in "such manner as to injure, stop, or interrupt the navigation of said river by boats, rafts, or other vessels."

One or two questions arise upon the construction of this legislation, which it is proper first of all to notice. It is said that the proviso must not be so construed as to defeat the general

purpose of the act of incorporation, and that, as piers were indispensable to a bridge, and necessarily obstructions more or less of the navigation, the legislature must be understood to have meant that the company should injure, stop, or interrupt the navigation as little as was consistent with the main object of the enactment.

It is a general principle in the construction of statutes that a proviso or saving clause which is directly repugnant to the purview or body of the act is not to have effect; but there are two reasons why this principle is not applicable here. In the first place, the repugnance is not apparent. It was not shown on the trial, and we do not know that a pier in a river is *per se* injurious to the navigation. It may possibly be capable of such location and construction as to throw an increased volume of water into the channel, and thus to benefit rather than injure the navigation.

But a more comprehensive reason why the principle suggested is not applicable here is, that this proviso is part of an act constituting a private corporation, and therefore to be taken as an essential condition of the compact between the public and the corporation. It is now the settled doctrine, both of the English and American courts, that an act of incorporation is a bargain between a company of adventurers and the public; that the rights of the corporation are such as the very terms of the enactment confer; and that any ambiguity in them must operate against the adventurers and in favor of the public: *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Adol. 793; *Charles River Bridge v. Warren Bridge*, 11 Pet. 545. And in measuring corporate rights, we are to look at all the terms employed in the fundamental law or compact. We can no more cut out some of them or mitigate their legal effect because they are in a proviso, than we could qualify the terms of a private agreement because found in one part of the instrument instead of another. The whole instrument is to be taken together, as expressing the final intentions and purposes of the parties. When the legislature tells a company, You may erect a bridge over a particular stream, provided you do not impair the navigation thereof, it is for the company to determine whether they will accept the franchise on such a condition; but if they accept it, they take it *cum onere*, and having no rights outside of their charter, they must enjoy their franchise subject to that condition, or not enjoy it at all.

The navigation of the streams of a country is a great public interest, and the law has always treated obstructions as public

nuisances. In *Rex v. Clark*, 12 Mod. 615, Holt, C. J., said that to hinder the course of a navigable river was against Magna Charta; and many subsequent statutes have punished it in England with specific penalties. In this country, and especially in Pennsylvania, the navigation of our rivers has been sedulously guarded both by legislative action and judicial opinion. We began by reserving the beds of our principal rivers for the use of the public, and granting the land to riparian owners only to low-water mark. In *Carson v. Blazer*, 2 Binn. 475 [4 Am. Dec. 463], and *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 71, the common-law definition of navigable rivers, limited to those in which the tide ebbs and flows, was exploded; and in many cases since, the right of navigation has been held paramount to the rights of fisheries, ferries, mill-dams, and internal-improvement companies. It was almost the only public right enjoyed by the hardy pioneers into what used to be called our "back lands," and has been the source of incalculable wealth and comfort to the people of the state. It was this right the legislature guarded from intrusion by the proviso in question; and it is too important and too well defined in law to be sacrificed to a mere technical rule of construction. The legislature may have the power to part with it, but with the words of the proviso before our eyes, we have not the power to say they have done so. On the contrary, it seems to us that the authority conferred was to build a bridge that should not injure, stop, or obstruct the navigation of the river.

Another idea suggested, and which found favor with the court below, was that the company was not bound to foresee the extraordinary development and increase of the coal trade upon the river as it now exists. This, taken in connection with the ruling that they were empowered to build a bridge causing as little injury and obstruction to the navigation as possible, amounts to this: that however great a nuisance the piers of the bridge are, now that a large business is carried on along the river, yet the company is not liable to an injured party, if, thirty or forty years ago, when they built the bridge, they obstructed the small trade of that day as little as possible.

This phrase, "as little injury as possible," besides being a loose reading of the proviso, is too indefinite for the purposes of the present case. The plaintiff may have had his whole fortune embarked in the boat which the defendants obstructed and destroyed, and yet his loss, as compared with the whole coal trade, was doubtless very small. If the terms "as little injury

as possible" are to include anything, a single boat-load of coal would not be an unreasonable sacrifice to the great public objects contemplated by the charter; and yet to the plaintiff the loss might be ruinous. Is he to bear it when his right of navigation has been reserved in express terms by the legislature? We think he has a right to insist on the performance of the bargain, or compensation in damages. But he is part of the increased coal trade: does that make any difference in his rights? The legislature must be presumed to have had all the natural growth of this trade in view when they authorized the bridge. The presence of coal in the lands drained by the Monongahela, its value for fuel, the constantly increasing market, and the dependence on this source of supply of those rapidly peopling regions south and west, were well known to the legislature. Did they not foresee that these circumstances would increase the demand and supply, and that this great natural outlet would be needed to accommodate both producers and consumers? How can a doubt be entertained on this point, when we find them guarding the navigation by language as express and precise as it is applicable to the trade of this day.

To limit their language in the manner proposed is to sacrifice the many to the few—the large trade of our time to the small trade of an earlier day. It is better reason to say that if the legislature thought the few citizens then engaged in the navigation of the river worthy of protection, much more the many who are now engaged. The language employed was accordingly large enough to comprehend all. But if the legislative intention comprehended the future and possible trade, so did the corporate intention, because the corporation accepted the bargain in the terms in which the legislature expressed it. Deducing the intention of one party from the terms of the contract, we get at the intentions of both, and are enabled to say that the true meaning of the act of incorporation is, that the bridge was to be so built as not to injure, stop, or interrupt the navigation either then or now, whether in its infancy or full growth.

One other point in the ruling of the court below is to be noticed. They were asked to say that if the jury believe the bridge is now an obstruction to the navigation, it is unauthorized by law. The answer was in these words: "Negatived if the jury believe the facts stated in answer to the fourth point; and that the channel or navigable portion of the river has been shifted or changed by natural causes, or by artificial causes

created by third persons." The answer to the fourth point was that if the bridge was erected in accordance with the charter, and so as to do the least possible injury or cause the least obstruction to the navigation, it was not a nuisance. Taking the two answers together, the doctrine taught was that a bridge constructed on the above principle would not become a nuisance by change of the channel. We have not the evidence in reference to a change of the channel, but if it was changed by artificial causes, created by third persons, we agree it could not affect the rights of the bridge company. If, however, it was changed for the worse by natural causes, influenced in their operation by the piers of the bridge, the defendants would be responsible for it. They were bound to foresee the natural and necessary effects of placing piers in the river. If the piers themselves did not interfere with the channel, but threw sand and other obstructions into it, whereby it was ruined or the navigation injured, the company would be as much liable for a consequential injury flowing so directly from their act as they would be if the act itself had wrought the injury without an intermediate agent. On this point the case of *Bacon v. Arthur*, 4 Watts, 437, is direct authority. In pursuance of our act of the twenty-third of March, 1803, relative to mill-dams in navigable streams, the defendant had built a dam in a creek which had been declared a highway. The act provided that the party erecting such dams "shall not obstruct or impede the navigation of such stream." It was alleged that the dam had changed the natural flow of the water, and caused certain mounds and bars to be thrown up whereby the natural channel was obstructed. The court below put the cause on the point whether the dam had been scientifically erected, and instructed the jury that if they believed it had been so erected, and that the bars were the necessary and inevitable effect of such erections, the plaintiff could not recover. In reversing this opinion, Judge Rogers said: "Where the injury arises from a bar which is the immediate effect of a dam erected in the bed of a river, I cannot bring myself to doubt but that it is such an obstruction of the navigation as was in the view of the legislature, and is embraced in the proviso." He then goes on to distinguish this class of cases from that of the *Lehigh Bridge Co. v. Lehigh Coal etc. Co.*, 4 Rawle, 24, which was the case of injury resulting from the act of Providence, without fault in the defendant. Both on reason and authority, we think the court erred in so much of their answer to the fifth point as relates to a change of channel through natural causes.

We have now alluded to those views of the chartered rights and duties of the defendants which prevailed to defeat the plaintiff's action in the court below. There was no question of negligence on his part. As presented to us in the record, it is the case of a citizen navigating the Monongahela with due diligence and skill, but losing his property by reason of the piers placed in the river by the defendants. They justify the obstruction, and are bound to bring themselves within the act of assembly: *Commonwealth v. Church*, 1 Pa. St. 105. Interpreting that in the manner we have indicated, it will be for a court and jury to say, on a retrial, whether they have brought themselves within it—whether they have injured, stopped, or interrupted the navigation of the river. If they have done what the legislature forbid, they are liable to the plaintiff for the injury which their wrongful act has caused him.

But this is as far as the case requires or permits us to go. It is a private action, and not a public prosecution. The right of the company to maintain their bridge is drawn in question only incidentally, and is not concluded by anything we rule in adjusting the plaintiff's private rights.

Whether it is a public nuisance or not is a question which can only be determined by indictment at law or a bill in equity, to be prosecuted in either case at the instance of the public authorities. In respect to public rights, the construction which the court below gave to the proviso may very possibly be held to be the sound one. The long acquiescence of the public, and the great convenience of the bridge, as well as the vested rights of the corporators, are circumstances that would have weight in such an inquiry, but have none in this. Besides, if it should be found in such an inquiry that the violation of the charter consisted in an excess beyond the limit prescribed, the remedy would be, not utterly to demolish the bridge, but to remove the excess, and adapt the erection to the design of the law: *Dyer v. Depui*, 5 Whart. 597.

Judgment reversed, and a *venire de novo* awarded.

ACT CREATING CORPORATION, CONSTRUCTION OF, AND OF PROVISIONS IN: See *Enfield R. R. Co. v. Hartford R. R. Co.*, 44 Am. Dec. 556; *Mayor of Baltimore v. Baltimore & Ohio R. R. Co.*, 48 Id. 531. As to the powers arising under the act, whether incidental or otherwise, see *Penobscot Boom Co. v. Lamson*, 33 Id. 656; *Kinzie v. Chicago*, Id. 443; *Blair v. Perpetual Ins. Co.*, 47 Id. 129; *Ohio L. I. & T. Co. v. Merchants' I. & T. Co.*, 53 Id. 742; *State v. Commissioners*, 57 Id. 409, and note 414. To the point that a corporation has only such powers as are granted by its charter, see *Cleveland & Pittsburgh R. R. Co. v. Speer*, 56 Id. 334; *Missouri River Packet Co. v. St.*

Joseph & Hannibal R. R. Co., 1 McCrary, 286, all citing the principal case. The charter of a corporation is a contract with the state: See *Thorp v. Rutland etc R. R. Co.*, 62 Am. Dec. 256, and note 639.

OBSTRUCTION OF NAVIGABLE RIVER IS PUBLIC NUISANCE: See *Stump v. McNairy*, 42 Am. Dec. 437. The right of navigation is paramount to any other right in navigable rivers: See *Lewis v. Keeling*, 62 Id. 168; see also *McKeen v. Delaware Division Canal Co.*, 49 Pa. St. 434, citing the principal case to this point. The principal case is cited in *Clarke v. Birmingham & Pittsburgh Bridge Co.*, 41 Id. 158; *Flanagan v. Philadelphia*, 42 Id. 232; *Monongahela Bridge Co. v. Birk*, 46 Id. 130, to the point that the legislature may impose the conditions on which the bridge shall be built.

COMMONWEALTH v. ERIE & NORTH-EAST R. R. Co.

[27 PENNSYLVANIA STATE, 339.]

CORPORATION MAY DO THOSE ACTS ONLY WHICH IT IS AUTHORIZED TO DO BY ITS ACT OF INCORPORATION, and may exercise only such powers as are given in plain words, or by necessary implication, and all powers not given in this direct and unmistakable manner are withheld.

CHARTER OF CORPORATION AUTHORIZING IT TO BUILD RAILROAD from borough of Erie, then bounded south by Twelfth street, is not complied with where the borough is subsequently extended farther south by a building of the road from a point within the enlarged borough, but some distance outside of the former borough line; the change of the borough lines not affecting the obligations of the corporations.

LAWS MUST BE EXECUTED ACCORDING TO SENSE AND MEANING which they import at the time of passage.

SUPREME LEGISLATIVE POWER OF STATE MAY AUTHORIZE BUILDING OF RAILROAD on a street or other public highway, but corporation cannot appropriate such street or highway for such a purpose unless authorized to do so by the sovereign power of the state.

POWERS GIVEN TO CORPORATION WHICH CANNOT BE EXERCISED without disregard of restrictions with which they are coupled cannot be exercised at all.

CHARTER OF CORPORATION MUST BE CONSTRUED favorably to the public, and against the grantees.

DEED IS TO BE CONSTRUED MOST FAVORABLY TOWARD GRANTEE.

RAILROAD AUTHORIZED TO BE BUILT AT ONE PLACE, if built at other places, is a mere nuisance on every highway it touches in its illegal course.

CITY COUNCIL CANNOT, BY ORDINANCE, MODIFY OR REPEAL an act whereby a borough is laid out, and enacting that the "streets, lanes, and alleys thereof" shall forever be and remain public highways.

LACHES CANNOT BE IMPUTED TO COMMONWEALTH by a corporation.

BILL in equity. The opinion states the facts.

Thompson, Williams, Grant, and Griscom, for the complainants.

Stanton, Meredith, Hirst, and Campbell, for the respondents.

By Court, BLACK, C. J. This case requires us to give a construction to the charter of a private corporation. The frequency of such cases excites some surprise, when we reflect that an act of incorporation is and always must be interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation it may do; beyond that, all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the attorney general, or anybody else, should complain against a company that keeps itself within bounds, which are always thus clearly marked, and equally strange that a company which has happened to transgress them should come before us with the faintest hope of being sustained. In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation.

If loss or injury comes to anybody in consequence of an ignorant disregard of this principle, it is not our fault. We have done all that in us lay to impress it on the public mind and to warn corporations of the danger they might incur by disobedience. We enforced it to the utmost in the *Bank of Pennsylvania v. Commonwealth*, 19 Pa. St. 144; *Susquehanna R. R. Co. v. Sunbury & Erie R. R. Co.*; *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Pa. St. 9; *Commonwealth v. Franklin Canal Co.*, Id. 117. All of our predecessors on this bench occupied the same ground. The doctrine is maintained by the supreme court of the United States, and in many states of the Union. Even in England the justice and necessity of it are universally acknowledged and acted upon. But we do not mean to discuss the subject over again. The lawyer who is not already familiar with the numerous authorities upon it, to be found in every book of reports, will probably never become so; and the citizen who does not believe it to be a most salutary feature in our jurisprudence would hardly be convinced though one rose from the dead.

Our duty in this case is therefore not a difficult one. If the words of the defendants' charter, understood in their ordinary

sense, cover the acts complained of, or if there be a necessary implication of the power to do these acts, and nothing to forbid them, then this bill must be dismissed. But the defendants can take nothing at our hands by construction. We cannot widen the limits set to their privileges because they have found them inconveniently narrow. We have no more right or authority to stretch an old act of incorporation than we have to make a new one. In either case, we would be usurping legislative power, and granting away from the state privileges which she has seen proper to withhold.

The bill complains: 1. That the western terminus of the defendants' railroad is not where the act of incorporation requires it to be; 2. That it is so constructed as to impede and obstruct the free use of certain streets in the city of Erie; 3. That it also obstructs and impedes the free use of a public road laid out from Erie in the direction of Buffalo; and 4. That the defendants have made a contract by which they have surrendered the control of their road to a foreign corporation.

1. The act of incorporation authorizes the defendants to build a railroad "from the borough of Erie to some point on the east boundary of the township of North-East." The defendants' counsel insist that the word "from" should be taken inclusively, and that a road from any part of the borough to the proposed *terminus ad quem* is a compliance with the law. On the other hand, the counsel for the plaintiff insist that it must begin at the borough line, and not elsewhere. Our opinion is with the defendants on this point, but we think the argument on it was rather beside the purpose, since the terminus of the railroad is neither at the line of the borough nor inside of it. Coming from the east, it passes the east boundary of the borough at a distance of sixty rods south, and runs on about — rods farther in a direction precisely parallel with the south line of the borough, and there stops or connects with the road built by the Franklin Canal Company to the Ohio line. Certainly this is not a literal compliance with the act of incorporation. Making a road from a point selected by the defendants themselves sixty rods south of the borough, not coming within that distance of the borough at any place, is not making a road from the borough eastward. Is there anything in the peculiar circumstances of this case which will justify us in treating this infraction of the law otherwise than as we treat similar violations of duty when committed by companies? We shall see.

What I have said concerning the borough of Erie refers to

what it was when the act of incorporation was passed. In 1848, and before the defendants' work was made, its limits were extended so as to include the place where the terminus of the railroad had been fixed. At a still later period the borough was incorporated as a city. But we are very clear that this alteration of the borough lines did not in the least change the rights or obligations of the railroad company. All laws must be executed according to the sense and meaning which they imported at the time of their passage. A line which did not exist until 1848 could not have been in the mind of the legislature in 1842. The modifications made in the charter of the borough left the defendants' charter just where it was before. The amendment of one is not to be taken as a supplement to the other. If "the east boundary line of North-East township" had been shortened or obliterated, or differently named, by an act of assembly passed in 1848, the defendants would have understood very well that their right to locate the eastern terminus on any part of the township line as it existed in 1842 was not thereby altered or taken away. The law commanded the defendants to begin their railroad at the borough of Erie as it then was, and that command is in full force notwithstanding the change which has been made in other matters. Is this violation of the charter so trifling that we can overlook it on the principle of *de minimis*? The counsel of the company have not argued that it is—and certainly it is not. The place at which the terminus should be established being precisely and particularly designated by the act of incorporation, in words which rendered mistake impossible, all other places, whether near or far, are as surely excluded as if they had been expressly forbidden. If we cannot hold companies to a strict compliance with their charters, we cannot hold them at all. In some situations (and, for aught we can see, this may be one of them) the purpose and object of allowing the road to be built can be as completely defeated by a deviation of sixty rods as sixty miles. The directors must have thought that they could gain a point of great value to them by changing their terminus, or else they certainly would not have ventured upon it in the teeth of the law. And they must have been conscious, too, that the legislature had some important reason for confining them to the borough, or else they would have sought and got an amendment to their charter. This railroad was probably intended as an outlet to New York for the lake trade of Erie. It could not have been meant as a link in the connection between Buffalo and Cleve-

land, for there was not then any authority given to this company or any other to build a road westward from Erie to or towards the Ohio line. Its actual location puts it beyond the reach of the lake trade, being one hundred and ten feet above and three quarters of a mile distant from the harbor. It connects itself there with a road to Ohio, built in violation of law, and by a fraud which has already received its condemnation. By this means it has become part of a continuous line from New York to the west, carrying goods and passengers, not to the borough of Erie, but quite around and past it. I mention this merely as showing that the general scope of the law, as well as its literal words, has been disregarded. It is suggested, however, as a mere probability. We do not know nor care what the purpose of the state may have been. But one thing we do know—and that is enough—that the board of directors had no right to substitute their will for the plain requirement of the law. If the fair interests of the stockholders, if the accommodation of the neighboring people, if a due regard for the commerce of the whole country, if a magnanimous liberality to the citizens of adjoining states—if these considerations, or any one of them, required an amendment of the charter, the managers should have asked the proper authority of the government to make it. Assuredly there is no legislative body on the face of the earth to whom such an appeal, if well grounded, could be made with more certainty of success than to the general assembly of this state.

2. The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. It has been settled, not only in England: *Rex v. Morris*, 1 Barn. & Adol. 441; but in Massachusetts: *Newburyport Turnp. Co. v. Eastern R. R. Co.*, 23 Pick. 326; New York: *Drake v. Hudson River R. R. Co.*, 7 Barb. 509; and in Pennsylvania: *Pennsylvania & Trenton R. R. Case*, 6 Whart. 43 [36 Am. Dec. 202]. If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be estopped or impeded for the convenience of a neighborhood. But we can say this only in cases where the authority has been given by the sovereign power of the state. That any private individual or incorporated company not empowered to

do so by an act of the legislature can take possession of a street and make a railroad upon it without being guilty of a criminal offense, is a proposition which I am sure no lawyer would dream of making. The right of a company, therefore, to build a railroad on the street of a city depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words there can be no dispute about it. It may also be given by implication; for instance, if a company be authorized to make a railroad by a straight line between two designated points, this implies the right to run upon, along, or across all the streets or roads which lie in the course of such line. So also when an act of incorporation directs a road to be made between certain termini, by such route as the grantees of the privilege shall think best, it may be located on an intervening street or other common highway, if in the judgment of the directors it be necessary or expedient to do so. But when an act of incorporation authorizes the making of a railroad which it is not possible to make without using the streets of a town for part of it, still such streets cannot be so used if the same act of incorporation forbids it. If the powers given to the incorporators cannot be executed without disregarding the restrictions with which they are coupled, they cannot be executed at all. In a private deed an exception as large as the grant is void, because private deeds are construed most strongly against the grantor. But a grant of privileges by the state to a body of adventurers must be construed precisely the other way—in favor of the public and against the grantees. A prohibition, exception, or reservation in a charter must therefore stand in full force, though it destroy or make nugatory all the powers given to the company.

The act of incorporation now before us contains the following very emphatic clause: "The said railroad shall be so constructed as not to obstruct or impede the free use of any public road, street, lane, or bridge, now laid out, opened, or built, or to interfere with any burial-ground, dwelling-house, or building without the consent of the owner." It would certainly strike most men, upon the first look, that a railroad company with such a provision in its charter is on dangerous ground when it takes possession of a street. It is not at all easy to understand how the people of a city can have the use of a street, free from obstructions and impediments, when the street is of ordinary width, and has two railroad tracks upon it, along which locomotive-engines, with trains of cars, are running every five minutes of the

day. Nor is it by any means impossible that in this case the legislature intended to exclude the company altogether from the streets, even at the risk of having no railroad made; for the desire to preserve to the people of Erie and its neighborhood the free use of their streets and roads may have been stronger than the wish to establish a railway communication for them with New York.

An obstruction is anything set in the way, whether it totally closes the passage or only hinders and retards progress. A road may be obstructed more or less. The word "impediment" is almost synonymous with "obstruction," except that it is seldom, if ever, used to signify an entire blocking up of the way. It is an obstacle—not an impassable barrier. To understand these words in their ordinary import, and then say that a railroad is not *per se* an obstruction or impediment to the free use of a street by the public, is rather more than I can do. But perhaps it is not quite safe to interpret them according to their popular sense. Certain it is, that they have sometimes been otherwise used in acts of assembly. A law of Massachusetts provides that "if any railroad shall be so laid out as to cross any turnpike or other way, it shall be so made as not to obstruct such turnpike or way." It was decided in *Newburyport Turnpike Co. v. Eastern R. R. Co.*, 23 Pick. 326, that this did not prevent all interference with the road, but required only that it should cause the least possible inconvenience or impediment. By a statute of this state, enacted in 1803, the owners of lands adjoining navigable streams were permitted to build dams, provided that such dams should "not obstruct or impede the navigation of such streams, or prevent the fish from passing up the same." This court, in *Bacon v. Arthur*, 4 Watts, 440, declared that if these words were taken literally, the owners could not avail themselves of the privilege at all; but as this construction would have been contrary to the grant itself, a more liberal one was adopted, and a dam which did not materially hinder the navigation was held not to be within the prohibition. Although the reasoning of these cases does not altogether fit the one before us, they are entitled to much weight. They are decisive, indeed, of one thing which is important; namely, that the words in question may sometimes have a legal signification different from that which we would otherwise have been disposed to assign them. For the sake of consistency, we must follow in the steps of those who went before us, though it be true that the track is not very clearly marked.

Let it then be conceded as a possible thing that a railroad can be so constructed on a public street that it will not be an obstruction to its free use; that such railroad is not in any sense a nuisance *per se*; that a street may be occupied in common by a railroad and the public without any such inconvenience to the latter as will amount to an impediment, or abridge the freedom of its use for ordinary purposes: still it is not true, as the converse of the argument would make it, that the street is unobstructed as long as travel upon it is not entirely prevented. If it be proved that a man may squeeze himself along beside the track, or dodge across at the peril of his life, it does not follow that the use of the street is free, unobstructed, and unimpeded. We hold, therefore, that under a charter like this { a railroad cannot be built on a street in such a manner as to cause any material obstruction. If we assume, as we do, that the clause under consideration does not entirely forbid the company from going on any street, we must also allow them to create such impediments as cannot be avoided. But those which are not absolutely necessary to the making and using of the railroad are unlawful; for managers are bound to leave the street as nearly free from obstructions as they can, and for that purpose to spare no reasonable expenditure of money or labor. If, for instance, the railroad be made above the level of the street, they must grade the rest of the street also, if that will make it better for the public accommodation. They cannot say to the city authorities, We have destroyed your street and rendered it impassable; but we have not impeded its free use, because you can restore it again to a tolerable condition at your own expense. Neither does it make any difference whether it be a main thoroughfare or an unimportant by-street, for this act of incorporation protects all alike.

We have attentively considered the bill, answer, and evidence in the cause, and they satisfy us of the following facts: 1. A considerable portion of one street within the present limits of Erie city is occupied almost entirely by the railroad in a manner which makes any considerable use of it for other purposes almost impossible; and this is true, although the defendants themselves say that the street might be safely and conveniently used if it were properly graded—a duty which they left unperformed; 2. Two streets are crossed by the railroad on bridges, which are too low and too narrow for large wagons passing one another, or for a single wagon with a bulky load; 3. Two other streets are crossed on an embankment considerably above grade,

with a ditch on each side, and thus all passage along those streets by any kind of a vehicle is as completely stopped as it could be by a stone wall twenty feet high. All these things are illegal for the reasons given. That some of these streets are on low, wet ground, and little used, might be a sort of apology for the defendants if we were sitting here to take excuses for the violation of the law. But that is no part of our duty. ✓

A large part of the evidence refers to the danger encountered by persons obliged to cross the railroad when trains were approaching, and the delay and inconvenience caused by cars which totally blocked up the crossing places. If the defendants have a right to make the road on a street, they have also the right to use it when made. They may carry all the freight and passengers they can get. If the number of cars and locomotives necessary to do their business be so great as sometimes to choke the thoroughfares over which they pass, it must be remembered that the same thing would happen in a much greater degree if the twentieth part of the business were done in carriages, coaches, and common road-wagons. If the cars are suffered to stand for an unnecessary length of time at places inconvenient to the public, the act is indictable as a nuisance, and for any want of proper care the defendants are liable in damages to the persons injured by it. But it cannot be said that they have violated their charter in causing obstructions of this kind, unless such obstructions could have been prevented or diminished by a different construction of the road.

Under other circumstances, the voluminous body of evidence laid before us might require a much more extended discussion. But we are content with the compendious reference we have made to it, because every inch of this railroad which lies upon any street of the city is unlawful, at all events. If the defendants had begun their railroad at the place designated in their act of incorporation, they would not have interfered with any of the streets mentioned in the bill, except Ash lane, and that would have been crossed at a different place. When a railroad authorized to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course. The streets in question not being on any route which the defendants were authorized to take, they are on them in disobedience of their charter, and all they have done there is without the shadow of authority. It is useless, therefore, to inquire how much of the inconvenience complained of might have been

avoided by a better construction. It is enough to say that the railroad has no business at all to be where it is.

It appears that the city authorities gave their consent to the use of the streets and to the location of the railroad on the ground which it now occupies. This privilege was given "so far as the mayor and councils have legal power in the premises," upon condition that the railroad should cause the least possible obstruction to the ordinary travel and business of the streets, and with a reservation of the right to withdraw the privilege whenever it should appear to the councils to be injurious to the interest and welfare of the city. The condition was broken and the privilege was revoked. But if the resolution of the councils had remained in full force up to this time, it would have been of no avail here. They had no "legal power in the premises." An act of the legislature cannot be repealed or modified by the ordinance of a city corporation. What the defendants did in disregard of the law was no less an offense against the rights of the public, because the city was in some sort *particeps criminis*. If both had persisted in it, the commonwealth's duty would have required her to see that the rights of her citizens were vindicated against both.

3. It is alleged and proved, and not denied, that the railroad has been laid down on and along a public road, called the Buffalo road, in such a way that for some distance it cannot be and is not used by the public at all, but on the contrary, that portion of the people who would otherwise travel thereon are obliged to take another way which the railroad company has opened for them. Of course, this is within the prohibition against obstructions and impediments to the free use of public highways. The answer to this charge is not based on any interpretation which the charter is thought to be capable of. Other grounds are taken. One defense is that the railroad could not be made in a straight line without taking a part of the Buffalo road. We can only say that if a railroad cannot be made straight without violating the law, it must be made crooked or not made at all. Equally baseless (even if true) is the other argument, that the public has suffered no injury by this act. Those public interests which lie outside of the defendants' charter are not committed to their keeping. The legislature has thought proper to guard the right of the people to the free use of their own roads, by enjoining the defendants not to impede or obstruct them. This injunction it was wrong to disregard, even for the sake of a supposed public benefit. The

people have rejected the boon which the company tendered them, and the state, *parens patriæ*, now demands for them the rights which are secured and reserved by her own laws.

4. The charge that the defendants have by contract surrendered the control of their road to a foreign corporation was but faintly pressed in the argument. We do not consider the contract illegal, and if our opinion were different, we would withhold it until all the parties could be brought before us.

This disposes of the principal allegations in the bill. But aside from these, there are one or two matters suggested by the defendants' counsel which ought not to be passed without a remark.

They have argued that no decree could be based on obstructions created by the use of the railroad, because the act of incorporation provides only against the road being so constructed as not to impede, etc. And the bill charges nothing else. Whatever impediments are caused by the ordinary and proper use of a railroad we attribute to its construction, if such impediments could have been avoided by a different construction. The legislature said to the corporators, You may make a railroad between certain given points, and use it when made by running cars and steam-engines on it; but you must so make it that its existence and use in this way will not impede the traveling on any highway now laid out. The railroad is so made that locomotives cannot be used on it without impeding travel on a certain highway previously laid out. Such a railroad is not constructed according to the law. If it were, the use would be proper enough.

The defendants' counsel have made another point which it is right to notice. It is said that though this proceeding is conducted in the name of the state, its real object is to redress a supposed injury, which is private, or at most merely local, in its character. We are urged to look, not at the flag, but at the parties who fight under it. These parties—the public authorities of Erie, and the people of the neighborhood—encouraged the defendants to expend large sums of money in building the railroad, and the attempt which they are now making to break it up is denounced in the argument as an act of wanton injustice. The only party before us is the commonwealth. We do not even know the names of the other persons alluded to. The commonwealth complains in due form by her accredited legal representative, the attorney general, that one of her corporations has violated its charter. We have investigated the case:

and found the complaint to be true. The delinquent corporation cannot justify itself by showing that in the commission of the wrong it received aid and comfort from other persons. If the mayor and councils of Erie, or their constituents, connived at this breach of law, they were guilty of a sin, for which their best excuse is that they seem to have repented of it, and are now disposed to assist the state in bringing the other offenders to the same wholesome state of mind. It cannot be that the defendants were misled by the people or their officers, for they must have known that a city ordinance could not authorize what an act of the legislature forbade. No laches can legally be imputed to the commonwealth, and in point of fact, she has been guilty of no unfairness. She spoke her will plainly in the act of incorporation, and gave it to the defendants to be a guide to their feet and a lamp to their path. They disregard it. The attorney general proves the fact, and stands up for judgment. We cannot refuse what law and equity demand.

Decree: This cause came on to be heard before the supreme court on the bill of complaint, on the answer of the defendants, and on the proofs and evidence taken by both parties, and was argued by counsel; and thereupon it appears to this court that the defendants have built and do now use and maintain a certain railroad known as the Erie and North-East Railroad, of which said railroad a part is within the present limits of the city of Erie, and upon certain streets thereof, and another part is upon the bed of a certain public road known as the Buffalo road, in Harbor Creek township, Erie county; and that the said railroad in those parts thereof is a public and common nuisance. It is therefore ordered, adjudged, and decreed that the defendants shall, on or before the expiration of four months from this date, break up so much of their said road as lies upon the said streets, and upon the Buffalo road, and remove the materials thereof, so as to leave the said streets and road in as good condition as they were in before the construction of said railroad.

And it is further declared and adjudged that the said defendants are bound to make the borough of Erie, with such limits as it had in 1842, the western terminus of their railroad. It is therefore decreed and ordered that the said defendants shall, within four months from this date, change the route and construction of their railroad accordingly, and make their western terminus at what was the eastern line of the said borough in 1842, or within the same borough. And the said defendants shall reconstruct their railroad to supply the parts hereby or-

dered to be broken up, according to plans and specifications to be by them made, and to be submitted to and approved by this court, on full notice to the counsel of the commonwealth, and not otherwise. And the defendants shall pay all lawful costs, to be taxed by the prothonotary.

LOWRIE, J. I concur in nearly every part of the opinion read by my brother, the chief justice, and in the decree that is about to be pronounced, and it would have afforded me great pleasure to have had the concurrence of my brethren in pronouncing one more stringent in its requisitions.

The defendants were incorporated in 1842 to make a railroad from Erie to the state line on the east, and it is very plain that the sole thought that was in the mind of the legislature in incorporating it was to provide a means of commercial connection between the harbor of Erie and the state of New York. It is very plain, also, that this company has turned almost entirely aside from this purpose to one that was not at all intended, and with the aid of that fraudulent concern, the Franklin Canal Company's road, they have carried out their own main purpose of forming a connection between Ohio and New York, and have converted the intended and proper terminus of their road into little better than a water-station.

And in the course of their proceedings they have shown very little regard for the public authorities of the state. Contrary to law, and in violation of the express orders of the road commissioners, they took possession of a part of the Buffalo or Ridge road, and used it according to their own will. And much of the same disregard of the public authorities has been exhibited in their relations with the public officers of the city of Erie. Though a mere private corporation, and operating for the purposes of gain, they seem to have assumed that the regular local authorities must stand aside for them, as if in the presence of their official superiors. I discover very little palliation for their errors, and should have been willing to allow them much less indulgence in the mode of retracing their steps.

I am sorry that my brethren think that when an incorporated town or city is made the terminus of a railroad the company has, by implication, a right to carry their road to any point within the town or city, and along any of its streets that they may choose, and this without being at all subject to the direction or restraint of the local authorities. I should have been pleased to have the concurrence of my brethren in a contrary doctrine. It seems to me that this is giving to mere pri-

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vate corporations or associations a superiority thus far over those public functionaries to whom the interests of the public are intrusted, and this, too, by no necessary implication. It seems hard enough to have to make such an implication in relation to a town or city that lies between the termini.

Let it be called illiberal to break the connection between this road and the western one. This is a matter, not for us, but for the legislature, to consider, and perhaps they have done so. It is not impossible that we may allow the cry of illiberality to drive us into a quixotic and impracticable cosmopolitanism. State pride, state enterprise, patriotism, is selfishness; but it is the very form of selfishness that is at the bottom of all national glory. I trust that it is not to be frittered away by the mere American feeling, which is always tending to obliterate the local and more effective feelings out of which our present liberties grow, and upon which they depend.

Knox, J., concurred.

LEWIS and WOODWARD, JJ., dissented.

LOWRIE, J., IN CONCURRING OPINION, agreed with all that had been pronounced by Chief Justice Black, except that he dissented from that portion of the opinion wherein it is held that when an incorporated town or city is made the terminus of a railroad, the company, by implication, has a right to carry its road to any point within the town or city, and along any of its streets that it may choose, and this without being at all subject to the direction or restraint of the local authorities. Knox, J., also concurred in the opinion of the court, but Lewis and Woodward, JJ., dissented.

At a subsequent sitting of the court the defendants presented plans for the change of said road in pursuance of the decree, which plans were objected to by the plaintiff, on the grounds that although they would bring the road within the limits prescribed by the charter, they would result in a great injury to the business of the borough. The court, Black, C. J., after a hearing, rendered an opinion, the substance of which was that as it had before granted relief to plaintiff because defendant had acted out of its corporate authority, so, on the other hand, it would now approve said plans because they were within the limits prescribed by the act of incorporation, even though such course might result in inconvenience and damage to plaintiff, and that though plaintiff now asked that the plan be modified so that said road should run on a certain street, for the same reason, namely, that the charter did not so authorize, the court must refuse to so modify the plans; and a decree was thereon made approving said plans, with one exception, in which they did not conform to the charter, which was in regard to occupancy of the Buffalo road, and which it was declared the company had no right to occupy, and in that respect only the plan was disapproved. In this decree Lewis, J., concurred in an opinion, the substance of which was that the only authority of the court was to keep the corporation within the charter limits, and that though the change in the road according to the plans did not secure to the city what it desired, and only produced inconvenience and damage, yet since

the corporation selected the course it did within the charter limit, the plan must be approved.

Subsequently another plan was presented, and though objected to, was approved, and several extensions of time for work granted thereon, Knox and Lowrie, JJ., dissenting, because of such extensions of time. Black, C. J., then rendered an opinion on this point, declaring that the court had a right to so extend the time within which the work was to be done: 1. Because more time was actually needed to do the work according to the plans; and 2. That the court had a right to further extend the time until the determination of the rights of the road which at the time connected with the defendant road, so as to do justice to the defendant, and not bring ruin upon it by severing it from the connecting road, and causing it a loss of a great part of its business, until it was determined whether the connecting road might properly bring its road to a connection with the defendant company's road, under its new plan. Thereon it was ordered that the time for such work be extended until the right to form such connection be ascertained, providing the bill therefor be prosecuted with due diligence.

ACT OF INCORPORATION, WHAT POWERS CONFERRED BY: See *Dugan v. Bridge Co.*, ante, p. 464, and cases collected in note 470. The principal case is cited to the point that a corporation can do only those acts which are expressly or by necessary implication within the powers given by its act of incorporation, in *Stewart's Appeal*, 56 Pa. St. 422; *Philadelphia v. Philadelphia etc. R. R. Co.*, 58 Id. 264; *Johnson v. Philadelphia*, 60 Id. 451; *Pittsburgh & Connelsville R. R. Co. v. Alleghany*, 63 Id. 135; *Covey v. Pittsburgh, Ft. Wayne etc. R. R. Co.*, 3 Phila. 179; *Rice v. Railroad Co.*, 1 Black, 380; *Alabama & Chatt. R. R. Co. v. Jones*, 5 Nat. Bank. Reg. 106. The construction given to the proviso in the charter in the principal case is reviewed and followed in *Martin v. Second & T. S. R. R. Co.*, 3 Phila. 319.

DEEDS ARE TO BE CONSTRUED MOST STRONGLY AGAINST GRANTOR and in favor of the grantee: See *Budd v. Brook*, 43 Am. Dec. 321; *City of Alton v. Illinois Transp. Co.*, 52 Id. 479, and cases in notes.

STREETS AND HIGHWAYS ARE STATE PROPERTY and subject to its direction and control, and the state legislature may authorize the building of railroads thereon: See *Case of Philadelphia etc. R. R. Co.*, 36 Am. Dec. 202, and cases in note 210. The principal case is cited and followed on this point in *Stanley v. Davenport*, 54 Iowa, 469; *Mercer v. Pittsburgh, Ft. Wayne etc. R. R. Co.*, 36 Pa. St. 104; *Southwark R. R. Co. v. Philadelphia*, 47 Id. 321; *Lance's Appeal*, 55 Id. 26; *Cleveland & Pittsburgh R. R. Co. v. Sheer*, 56 Id. 332; *Railroad Co. v. Leavenworth*, 1 Dill. 398.

THE PRINCIPAL CASE IS MISQUITED in *Soohan v. Philadelphia*, 29 Pa. St. 32; S. C., 1 Grant Cas. 517.

ALLEN v. GAULT.

[27 PENNSYLVANIA STATE, 473.]

SALE OF LANDS BY SHERIFF UNDER ORDER OF COURT OF RECORD IN ACTION OF PARTITION is in pursuance of a judgment of such court, and can be confirmed or set aside by the judgment of that court alone; and if the purchaser to whom the property is sold under such proceedings claims to have reason for setting aside the sale, he must apply for relief to the

court having jurisdiction of the case, and by whose order the sale was made.

PROCEEDINGS OF COURTS OF COMPETENT JURISDICTION CANNOT BE REVISED by another court in a collateral proceeding.

SALE IN PARTITION SUIT WILL PASS NOTHING BUT TITLE WHICH WAS VESTED in parties to the proceeding.

ASSUMPSIT to recover back the purchase price paid by plaintiff at a certain sheriff's sale in a partition suit, plaintiff alleging that at such sale he was induced to purchase by misrepresentations. The remaining facts appear in the opinion.

C. K. Biddle and McCall, for the plaintiff in error.

McMurtrie, for the defendant in error.

By Court, LEWIS, C. J. It is not necessary, in the view which we take of this case, to determine whether the rule *caveat emptor* applies to a purchaser at a sale of lands made by the sheriff under the order of the district court in an action of partition. It is sufficient for the purposes of the cause to say that such a sale is in pursuance of a judgment of a court of record, that it can be confirmed or set aside by the judgment of that court alone, and that if the purchaser to whom the property is sold under such proceedings have any just reason for setting aside the sale, he must apply to the court having jurisdiction of the case, and by whose order the sale was made, to grant the appropriate relief. This was the course pursued in *Richter v. Fitzsimmons*, 4 Watts, 251; and the decree of the court refusing to set aside the sale was held to be conclusive against the purchaser in an action for the purchase money. It is not material that that case was a sale by the administrator for the payment of debts. The principle on which the decision was made is, that the proceedings of a court of competent jurisdiction cannot be reversed by another court in a collateral action. That principle applies as well to sales in cases of partition as to sales for payment of debts. The same principle was accordingly applied in the case of a sale under the order of the orphans' court in proceedings in partition there: *Sackett v. Twining*, 18 Pa. St. 199 [57 Am. Dec. 599]. It is impossible to perceive the slightest difference in principle between that case and the one now before us, because the district court is as much entitled to respect in all cases within its jurisdiction as the orphans' court. In both cases the object was partition, and in both cases the sales were made, not by the acts of the parties, but under judicial authority. The court is not authorized to enter into covenants with

the purchaser in either case. Nothing can be sold but the title which was vested in the parties to the proceedings. The purchaser bids for that alone. If any unfair representations are made to him at the sale, whereby he is deceived, he may be heard before the court having jurisdiction of the partition, but not elsewhere. It would be productive of great embarrassment in such proceedings if the action of one court could be disturbed or reviewed by a court of co-ordinate jurisdiction in a collateral action. It is the duty of the purchaser to pay his money to the officer of the law, according to the conditions of the sale. The sheriff is not bound, like an individual, to tender a deed before he demands the money. The court will see that justice is done to the purchaser: *Scott v. Greenough*, 7 Serg. & R. 197; *Negley v. Stewart*, 10 Id. 207. Under the evidence in the cause, the plaintiff below was entitled to recover.

Judgment reversed, and judgment entered in favor of the plaintiff in error on the verdict.

JUDGMENT IN PARTITION, EFFECT OF: See note to *Nicely v. Boyles*, 40 Am. Dec. 640; *Herr v. Herr*, 47 Id. 416.

THE PRINCIPAL CASE IS CITED, and the proposition there laid down, that a partition sale is a judicial sale, questioned, in *Girard L. I. Co. v. Farmers' and Mechanics' Bank*, 57 Pa. St. 394.

SHOWERS v. SHOWERS.

[27 PENNSYLVANIA STATE, 485.]

WHERE IT IS SOUGHT TO BAR WRIT OF ERROR BY MATTERS OF FACT which do not appear on record returned, they should be brought to the view of the court, either by plea or by motion to quash.

WILL MAY BE GOOD UNDER PENNSYLVANIA ACT of April 8, 1833, which provides that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction," where the testator has given complete directions for the drawing of such will, and it has, in accordance therewith, been put in writing in his life-time, and he is so prevented by the extremity of his last sickness from signing it himself or giving directions to another to sign it for him, if it is established in some other manner.

ISSUE of *devisavit vel non* to try whether a certain paper was the last will and testament of Peter Showers. The testator, being very ill, sent for a person to write his will, who after writing it, placed it upon the lid of a bandbox before the said Peter Showers to sign; but finding that the lid yielded to the pressure

of his arm, it was removed and a stand was placed near the bed, and the testator assisted out of his bed to a chair beside the stand, where he took up a pen and wrote on a loose piece of paper the letter "P," and then, when about to put his pen to the alleged will, sunk back in his chair and expired, without speaking or being able to speak, and without signing in any way the alleged will. On the trial, the plaintiff below offered the paper in evidence, but it was objected to on the ground that it was not proved according to law, the above having been the evidence given. The court overruled the objection, and allowed the paper to be read in evidence. The defendant sued out a writ of error, and assigned for error the action of the court in admitting the above paper in evidence.

Boyd, for the plaintiff in error.

G. R. Fox, contra.

By Court, LEWIS, C. J. The objection to this writ of error, founded upon the delay in taking it out, depends upon the date of the decree in the register's court. If the objection were substantial, we cannot take notice of it, because the decree of that court is not brought up on this writ of error; nor has the defendant in error presented it to us in such a form as to justify any action upon it. We do not know that any decree whatever has been pronounced by the register's court. When the object is to bar a writ of error by matters of fact which do not appear on the record returned, they should be brought to the view of the court, either by plea or by a motion to quash: *Martin v. Ives*, 17 Serg. & R. 364.

Prior to the act of the eighth of April, 1833, so few formalities were required for a valid will that "real or personal estate might be transferred by a will, though there was no signature, seal, or attesting witnesses to it, and though it was not in the handwriting of the testator." This is the reason assigned by the commissioners of the revised code for recommending the enactment of the sixth section of that act. By that section it is required that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction." The commissioners in their report state that as "cases may arise in which the testator may have given full and complete directions for the drawing of his will, which has accordingly been put in writing in his life-time, but in consequence of the extremity of his

last sickness he may have been prevented from signing it or giving directions for that purpose, we have excepted such cases from the provision and left them to stand upon the present law:" Hood on Executors, 12. In *Ruoff's Appeal*, 26 Pa. St. 219, Mr. Justice Woodward has very plainly intimated that it is not necessary that a will should be "signed by the testator, or by any person in his presence, and by his express direction," if he is prevented by the extremity of his last sickness from giving such direction to another, as well as from signing it himself. The case before us is one of this character. The testator was neither able to sign it himself nor to request another to sign it for him, and that inability was caused by the extremity of his last illness. Under these circumstances, the will, if otherwise established, was good without these formalities. The construction contended for by the plaintiff in error would be contrary to the intentions of the commissioners as declared to the legislature, when they reported the act, and equally at variance with the exception plainly expressed in the act itself. It differs in this respect from the fourth section of the British act of 1837, which adopts the rule of our act of 1833, without the exception. The English decisions can, therefore, furnish no rule for us in cases within the exception provided for in our act.

Judgment affirmed.

WILLS, EXECUTION OF, UNDER PENNSYLVANIA ACT OF 1833: See *Asay v. Hoover*, 45 Am. Dec. 713; *Grabill v. Barr*, 47 Id. 418.

MARTIN v. JACKSON.

[27 PENNSYLVANIA STATE, 504.]

CONVEYANCE TO HUSBAND AND WIFE AND THEIR HEIRS AND ASSIGNS created such an estate as upon the husband's death would vest in the widow as survivor, in Pennsylvania, before the act of 1848, and the wife had, therefore, a right to mortgage the property, which would not be restricted by a provision in her husband's will that it be sold for the payment of debts, nor would her mortgagee be bound to examine the will as to question of title.

KNOWLEDGE ACQUIRED BY ATTORNEY IN ANOTHER TRANSACTION BETWEEN OTHER PARTIES does not affect one who subsequently employs him, and is not notice to the latter.

ADVERSE POSSESSION MAY BE NOTICE TO PURCHASER, BUT POSSESSION TO HAVE THAT EFFECT must be clear, distinct, and unequivocal.

NOTICE TO PURCHASER AT SHERIFF'S SALE ON MORTGAGE of an existing adverse claim comes too late if the mortgagee had no notice when the mortgage was executed.

ADVERSE POSSESSION WITH CONSENT AND CONNIVANCE OF MORTGAGOR, unless so open as to be notice, cannot affect the mortgagee.

POSSESSION OF DISSEISOR, TO GIVE TITLE UNDER STATUTE OF LIMITATIONS, must be actual, visible, notorious, distinct, hostile, and of twenty-one years continued duration.

POSSESSION UNDER ENTRY ORIGINALLY MADE IN FIDUCIARY CAPACITY, to become adverse, must be evidenced by some decisive act or declaration.

POSSESSION OF MORTGAGOR IS THAT OF MORTGAGEE, and the former cannot make a lease of the premises so as to bind the latter.

REMEDY BY SCIRE FACIAS ON MORTGAGE DOES NOT EXCLUDE REMEDY BY EJECTMENT.

TENANT ENTERING UNDER TITLE OF MORTGAGEE IS PRESUMED TO CONTINUE IN POSSESSION in fidelity to the tenure; but when the mortgagee has notice of his adverse claim he may maintain ejectment.

ADVERSE POSSESSION FOR TWENTY-ONE YEARS, though commenced before installments were due on a mortgage, would bar the mortgagee.

ASSIGNMENTS OF ERROR NOT MADE IN ACCORDANCE WITH RULES OF COURT will not be noticed.

EJECTMENT. The property in dispute was conveyed to one Le Campion and wife, and their heirs and assigns forever. Le Campion died, and directed that the property in question, or a certain other piece, be sold for payment of his debts. The executrix elected to sell the other property, and that in dispute thereon went by way of devise to one Sarah Ann Martin. Some ten years afterward the testator's wife, Elizabeth Le Campion, executed a mortgage in favor of George Knorr for the property now in controversy. Judgment was obtained thereon when it became due, some twenty-seven years after testator's death, in a *scire facias*, and the property was thereon sold by the sheriff to Jackson, the plaintiff below, and a deed executed to him. Plaintiff brings this action for possession of such property, alleging that under the then existing statute the property vested on Le Campion's death in his wife, and that any direction in the husband's will would not affect her title. Mrs. Martin, the defendant below, set up adverse possession, and also averred notice on the part of the mortgagee and his purchaser. Plaintiff recovered judgment, and defendant sued out a writ of error. The remaining facts are stated in the opinion.

Sheppard, for the plaintiff in error.

B. Johnson, and W. A. Porter, for the defendant in error.

By Court, LEWIS, C. J. Before the act of 1848, relative to the rights of married women, husband and wife were regarded as one person in law. No action of partition, or waste, or account, or ejectment would lie by one against the other. The

husband could not sell his land free from the dower of his wife. The wife could not sell hers at all, without joining her husband in the conveyance. They were incapable, by reason of the marriage relation, of exercising any of the usual rights of tenants in common. It is evident, therefore, that they were incapable of taking an estate of that description. Such an estate, without any of its rights or incidents, is a legal impossibility: *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 397. It follows that the conveyance of the ninth of April, 1813, to Francis Le Campion, and Elizabeth, his wife, their heirs and assigns, and the partition and sheriff's deed of the fifteenth of April, 1818, in pursuance of it, to the same parties, created an estate peculiar to husband and wife, which on the death of Francis Le Campion became vested exclusively in his widow, Elizabeth, as survivor. She took this estate, not under or through her husband, but by virtue of the paramount grant in the original conveyance. She had, therefore, an undoubted right to execute the mortgage of the second of April, 1832, to George Knorr, unless she had deprived herself of that right by some act intervening between the death of her husband and the date of the mortgage. It is contended that she had done this by accepting a devise or bequest under her husband's will, in which the property in controversy was claimed by him. We have not been able to discover any evidence to show that she received anything under the bequest of a moiety of the personal estate. As it is in evidence that a portion of the real estate was sold for the payment of debts, it is not probable that she received any portion of the personal as legatee. The real estate which she accepted, as also that which she sold for payment of her husband's debts, as we understand the evidence, was her own property, independent of the will, as fully as was that now in dispute. If so, it is difficult to perceive the equity that is to estop her from claiming this, because she claimed other property which was also her own by title paramount to the will. But conceding that the will, and her acceptance of its provisions, estopped her from claiming the property in controversy in this suit, had George Knorr, the mortgagee, notice of it? He was not bound to examine the register's office for the will of Mr. Le Campion, because it did not lie in the channel of his title. He claimed by title independent of and paramount to the will: *McLanahan v. Reeside*, 9 Watts, 511 [36 Am. Dec. 136]; *Woods v. Farmere*, 7 Watts, 385. The notice to Mr. Potts could not affect Mr. Knorr. The knowledge acquired by an attorney in another transaction

between other parties does not affect one who subsequently employs him: *Bracken v. Miller*, 4 Watts & S. 102; *Hood v. Fahnestock*, 8 Watts, 489 [34 Am. Dec. 489]; *Boggs v. Varner*, 6 Watts & S. 473. An adverse possession may be notice to a purchaser; but the possession, to have that effect, must be clear, distinct, and unequivocal: *Billington v. Welsh*, 5 Binn. 132 [6 Am. Dec. 406]; *Cresson v. Miller*, 2 Watts, 275; *Sailor v. Hertzog*, 4 Whart. 259; *Green v. Drinker*, 7 Watts & S. 440.

In this case, it is in evidence that the premises, on the twenty-ninth of September, 1829, were demised by Mrs. Le Campion to McClure & O'Niel; that they, or one of them, occupied under that lease until about the twenty-ninth of March, 1832, two days before the second of April, 1832, the date of the mortgage to George Knorr; that on the eighth of October, 1832, on the sixth of November, 1832, and on the sixth of December, 1832, the tenants who succeeded McClure & O'Niel paid rents to Mrs. Le Campion. The last two payments were received by Sarah Ann Martin herself (then Miss Hubbs), as agent of Mrs. Le Campion, and the lease from Mrs. Le Campion to McClure & O'Niel was written by the same Sarah Ann Martin. Although there had been some declarations and acts which seemed to recognize a right in Mrs. Martin to receive the rents, or a portion of them, those acts, when taken in connection with the lease by Mrs. Le Campion, and the payment of rent to her, with the knowledge and assent of Mrs. Martin, did not amount to a "clear, distinct, and unequivocal possession" in Mrs. Martin. Taking all the facts in evidence to be true, this was the law of the case, and it was the duty of the court to say so. There was, therefore, no possession in Mrs. Martin, at the time of the mortgage to George Knorr, sufficient to affect him with notice of her claim. It is scarcely necessary to say that a mortgagee who advances his money on the credit of the land stands in a very different condition, as regards notice, from a judgment creditor, and that a mortgagee is regarded as a purchaser, and is protected from all secret equities and trusts of which he had no notice: *Hiestor v. Fortner*, 2 Binn. 40; *Cover v. Black*, 1 Pa. St. 493. Notice to a purchaser at the sheriff's sale on the mortgage comes entirely too late if the mortgagee had no notice when the mortgage was executed.

But the defendant below relies on an adverse possession of twenty-one years before suit brought. This ejectment was brought on the second of September, 1854. An adverse possession, to have any legal effect, must therefore be shown to

have commenced as early as the second of September, 1833. We find, from the receipts for rent of the sixth of November, 1832, and the sixth of December, 1832, that Mrs. Martin herself recognized P. Stebill & Co., at those dates, as the tenants of Mrs. Le Campion. ' There is no evidence that they were turned out of possession. On the contrary, the evidence is that they continued in possession and paid rents during the months of February, March, and June, 1833. But it is contended that they paid rents during these months to Mrs. Martin in her own right. The receipts do not, it is true, show that Mrs. Martin continued to act as the agent of Mrs. Le Campion. Are these three receipts sufficient evidence of an adverse possession to defeat the title of George Knorr? It must be remembered that after the execution of the mortgage Mrs. Le Campion stood in a condition very similar to that of a tenant at will under George Knorr. No adverse possession, by her consent or connivance, could affect George Knorr, unless it was of a character so open as to furnish him with the means of knowledge that his rights were invaded. It has often been declared that to give title under the statute of limitations, the possession of the disseisor must not only be actual, but it must be visible, notorious, distinct, hostile, and continued for the period of twenty-one years: *Hawk v. Senseman*, 6 Serg. & R. 21; *Adams v. Robinson*, 6 Pa. St. 271; *Hole v. Rittenhouse*, 25 Id. 493. And where the entry was originally as guardian, agent, tenant at will, or for years, or tenant in common, or in any other fiduciary character, it would require some decisive act or declaration to make the possession adverse: *McMasters v. Bell*, 2 Pa. 183. The possession of the agent is the possession of the principal; the possession of the guardian is that of the ward; the possession of the tenant at will or for years is the possession of the landlord; and the possession of one tenant in common is the possession of all: *Cook v. Nicholas*, 2 Watts & S. 27; *Graffius v. Tottenham*, 1 Id. 488 [37 Am. Dec. 472]. The possession of the mortgagor is the possession of the mortgagee, who is not, but at his own election, and for the sake of his remedy, liable to be disseised by any act of the mortgagee remaining in possession; and the latter can make no lease or contract respecting the mortgaged premises effectual to bind the mortgagee, or prejudicial to his title: *Gould v. Newman*, 6 Mass. 239; *Perkins v. Pitts*, 11 Id. 125, 130; *Hicks v. Bingham*, Id. 300; *Hopkins v. Young*, Id. 302; *Colton v. Smith*, 11 Pick. 311 [32 Am. Dec. 375]; *Powsely v. Blackman*, Cro. Jac. 659. In Pennsylvania, the estate of the

mortgagee before entry cannot, it is true, be sold on execution: *Rickert v. Madeira*, 1 Rawle, 325; and where a mortgagee permits a mortgagor to remain in possession, and raise and sell grain, he cannot afterwards claim the grain under his mortgage: *Meyers v. White*, Id. 353.

But it must, nevertheless, be remembered that by the common law the mortgagee, on the execution of the mortgage, becomes the owner of the legal estate; that the land and all its profits form a security for his debt; that the mortgagor is liable to immediate eviction by the mortgagee, unless protected by an agreement for quiet possession until default of payment; and that equity will, in no instance, interpose its authority to obstruct the mortgagee from evicting the mortgagor from possession, but for such purpose will consider the latter as tenant at will: Coote on Mortgages, 332; *Cholmondely v. Clinton*, 2 Meriv. 359. The remedy by *scire facias* prescribed by our act of assembly does not exclude the remedy by ejectment on the mortgage, because they are different in their objects and results: *Simpson's Lessee v. Ammons*, 1 Binn. 175; *Smith v. Shuler*, 12 Serg. & R. 240.

Having these rights, it is evident that George Knorr could not be disseised by the mere payment of a few months' rent to the daughter of the mortgagor, whether that payment were made in opposition to the will of Mrs. Le Campion or by her consent. In either case, unless it was brought to the notice of the mortgagee as a claim of title in hostility to his own, he is not to be affected by it, as the commencement of an adverse possession. So long as the tenant who entered under his title remains in possession, he has a right to presume that he continues there in fidelity to the tenure. But the moment he has notice of an adverse claim by the person in possession, he may vindicate his rights by ejectment: *Cholmondeley v. Clinton*, 2 Meriv. 359; Coote on Mortgages, 332. If he delays beyond the period of twenty-one years, it is his own fault. He would probably be barred, although the disseisin commenced before the installments of the mortgage money were due, because he had his remedy by ejectment. But it is not necessary to decide this point, as it is clear that he cannot be disseised by a secret act which works no visible change in the possession; such as the payment of rent by the tenant in possession to another person, with the assent of the mortgagor. In this case, so far as George Knorr was concerned, the possession of Mrs. Martin must be regarded as derived under and through her mother, Mrs. Le Campion, and

until the occurrence of some ouster or denial of Knorr's title, sufficiently open or notorious to attract his attention, Mrs. Martin's possession was nothing more than the possession of the mortgagee.

This disposes of all the material points in the case. The first and fourth assignments of error are not particularly noticed, because they are not made according to the rules of court.

Judgment affirmed.

CONVEYANCE TO HUSBAND AND WIFE VESTS ESTATE IN THEM AS TENANTS IN ENTIRETY, and the survivor takes the whole: See *Gibson v. Zimmerman*, 51 Am. Dec. 168, and note citing prior cases 172. In *French v. Mehan*, 56 Pa. St. 288, the principal case is cited to this point.

KNOWLEDGE ACQUIRED BY ATTORNEY BEFORE RELATION AS SUCH BEGAN will not amount to notice to the client: See *Hood v. Fahnestock*, 34 Am. Dec. 489.

ADVERSE POSSESSION, WHAT CONSTITUTES, AND EFFECT OF: See *Wright v. Guier*, 36 Am. Dec. 116, note; *Dikeman v. Parrish*, 47 Id. 455, note 465; *McCullough v. Wall*, 53 Id. 715, and note 726; *Stump v. Henry*, 61 Id. 300, and note 305; *Green v. Kellum*, 62 Id. 332; *Snodgrass v. Andrews*, 64 Id. 169. Adverse possession, unless so open as to be noticed, will not affect a mortgagee: See *Hood v. Hood*, 2 Grant Cas. 237; *Susquehanna Coal Co. v. Quick*, 61 Pa. St. 341; *Youngman v. Elmira R. R. Co.*, 65 Id. 286, citing the principal case.

PERSON IS COMPETENT WITNESS IF HIS INTEREST IS EQUALLY BALANCED: *Warner v. Carlton*, 22 Ill. 423.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

PADELFORD v. PROVIDENCE M. F. INS. Co.

[3 RHODE ISLAND, 102.]

BURDEN OF PROOF TO SHOW INSURANCE AVOIDED BY ALTERATION of the insured premises, whereby the risk is increased, contrary to a stipulation of the policy, is on the insurance company.

ALTERATION OF INSURED PREMISES BY "ACT OF PROPRIETORS," so as to avoid the insurance, within the terms of the charter of the insurance company, is an alteration by the owner himself, or authorized by him, or adopted as his before a loss accrues.

ALTERATION OF INSURED PREMISES BY TENANT IS NOT ALTERATION BY "PROPRIETOR," within the meaning of the prohibition in the charter of the insurance company, unless the proprietor authorized or adopted it.

JURY ARE JUDGES WHETHER "PROPRIETOR" AUTHORIZED ALTERATION OF INSURED PREMISES, within the prohibition of the charter of the insurance company, and must determine the same from all the surrounding circumstances, where the alteration was made by a tenant.

ACTION on policy of insurance of a dwelling-house. The charter of defendant's company provided, in substance, that the insurance upon any house or building should be void if, after insurance, any alterations should be made in the premises "by the act of the proprietors," whereby the risk should be increased, unless an additional premium should be paid by agreement with the company. The alteration in this case was the erection of an addition to the building by a tenant of the assured, and the fire took from a defective stove-pipe in such addition. The defendants introduced a conversation between the assured and the tenant, for the purpose of showing the former's assent to the alteration. The judge charged the jury that if the alteration was made by the tenant, and was not known to the assured before

the loss happened, the insurers were not liable; that the jury might consider the conversation introduced, and determine from that, in connection with the other circumstances, whether such conversation had reference to any material alteration affecting the risk, and which could not properly be made within the policy. Verdict for the plaintiff, and motion for a new trial for misdirection.

Tillinghast and Bradley, for the defendants.

Thurston, for the plaintiff.

By Court, STAPLES, C. J. The execution of the policy and the destruction of the insured building being shown, the defendants are *prima facie* liable, the preliminary notice and demand on them being admitted or proved. If they allege that the policy has been rendered void by reason of any alteration made in the building by the act of the proprietor, whereby the company is exposed to greater risk or hazard than they were in at the time of the insurance, the burden is on them to show it. Under the twenty-third section of the charter of this company, such an alteration, so made, does avoid the policy. It must be shown to be an alteration increasing the risk, and one for which a higher rate of premium would have been demanded had it existed at the time the policy was executed. In this case that was admitted to be the nature of the alteration made. It must also be by the act of the proprietor. A tenant is not the proprietor within the meaning of that section. It refers to the insured owner, and it must be his act, one that he does himself, or authorizes to be done, or one which he adopts as his before any loss accrues. The terms of this section, "act of the proprietors," implies all this, and are much more restricted than the words used in the policies referred to in the cases cited by the defendants. In them the policies were to be avoided by any alteration increasing the risk made "within the control" of the assured. Under such a policy the assured may be perfectly passive. The avoidance of the policy depends on no act of his. He may be entirely ignorant of the alteration, but if it be one which at the time of making the policy he could control, by parting with the control, his policy is avoided by any act increasing the risk.

Whenever it is alleged, as in this case, that the proprietor authorized the alteration by parol, the jury are properly left to inquire as to the extent of the authority given. In doing this, they ought to look at all the circumstances surrounding the parties at the time the authority was given, and particularly as

to what kind of alterations the authority related, whether proper or within the policy, and such as increased the risk, and whether the authority was wholly unlimited as to the kind and nature of repairs. They might also, under some circumstances, infer that the proprietor knew of the alterations made by his tenants from the fact of their near residence to each other. The alteration may be of such a nature that they will believe no tenant would make them without the previous knowledge and assent of his landlord. These circumstances were before the jury in this case, and after weighing them all they returned a verdict for the plaintiff.

We see no error in the charge of the court which will entitle the defendants to a new trial, .

ALTERATION OF INSURED PREMISES, effect of, on contract: See *Merriam v. Middlesex etc. Ins. Co.*, 32 Am. Dec. 252; *Houghton v. Manufacturers' etc. Ins. Co.*, 41 Id. 489; *Jones Mfg. Co. v. Manufacturers' etc. Ins. Co.*, 54 Id. 742; *Gates v. Madison etc. Ins. Co.*, 55 Id. 360, and cases collected in the notes thereto.

BENNETT v. EVERETT.

[3 RHODE ISLAND, 182.]

EXPRESS PROMISE IS NECESSARY TO REVIVE DEBT BARRED BY BANKRUPTCY DISCHARGE, and such promise must refer to the debt, though it need not be made to the holder thereof. It need not be in any particular form of words, but may be made by any words, or perhaps by signifying a present willingness to pay.

BARE ACKNOWLEDGMENT OF DEBT BARRED BY BANKRUPTCY, and of its justice and non-payment, is not sufficient to revive it.

JURY ARE JUDGES WHETHER PROMISE TO PAY DEBT BARRED BY BANKRUPTCY was imported or intended by the language used by the debtor and the surrounding circumstances.

ASSUMPSIT upon two promissory notes made by one Joslin, of whom the defendant was administrator. The defendant pleaded a discharge in bankruptcy obtained by his intestate. Reply, a new promise. After evidence to show the promise, the court below, it seems, charged the jury, in substance, that they might infer from the evidence an intention on the part of the intestate to make an unequivocal promise to pay. Verdict for the plaintiff, and motion for a new trial for misdirection.

A. C. Greene and Bradley, for the defendant.

Potter, for the plaintiff.

By Court, STAPLES, C. J. We have carefully examined the charge given to the jury in this cause, as contained in the minutes of the late Judge Haile. The defendant has not the slightest reason to complain that the law was not therein stated as favorably to him as any approved authorities would permit. We certainly are not inclined to go any further in the defendant's favor than he did. To renew a debt barred by a certificate of bankruptcy, there must be an express promise to pay it: express, as contradistinguished from the promise which, under certain circumstances, the law will imply from certain facts. This promise need not be to the holder of the debt, but it must refer to the debt, without question. No particular form of words need be used to constitute this promise. Any words, or perhaps signs or acts, which signify a present willingness to pay the debt, and which are intended to convey that idea to the hearer, are sufficient. The natural import of the words used must be a contract to discharge by payment the moral obligation that remains out of the debt discharged by the certificate. A bare acknowledgment of the justness of the debt, of its present existence as a debt formerly contracted and now unpaid, is not sufficient. Such statements as these will remove the bar of the statute of limitations, for from these the law will imply a promise to pay. Not so as relates to the bar of the bankrupt's certificate. The bankrupt must make the promise, and not leave it to the law to imply it. In this sense the promise must be express. It must also be unqualified and unconditional, or else the party seeking to avail himself of it must show the condition performed. Here it corresponds with the kind of promise necessary to remove the bar of the statute of limitations.

Such we understand to be the meaning and language of the charge to the jury in this case. Whether such a promise was made, the judge in the charge very properly left it to the jury to determine. The jury were left to inquire whether the language used by Joslin and the surrounding circumstances imported or intended an express and unequivocal promise, in the sense of the terms as before explained. This we think was their appropriate duty and office. They were furthermore to be satisfied from the evidence "that Joslin intended to make himself liable to pay, and that plaintiff so understood it," unequivocally and without any condition. This conclusion they should draw from the legal evidence in the cause.

The motion must therefore be overruled, and the plaintiff have judgment on the verdict.

PROMISE TO PAY DEBT DISCHARGED BY BANKRUPTCY: See *McWillie v. Kirkpatrick*, 64 Am. Dec. 125, and other cases in this series collected in the note thereto. In *Hubbard v. Farrell*, 87 Ind. 217, the principal case is cited to the point that if the words used by the bankrupt were capable of being construed as a promise, it is for the court acting as a jury to determine whether he intended by those words to promise to pay the debt.

IVES v. HAZARD.

[4 RHODE ISLAND, 14.]

MEMORANDUM OF CONTRACT FOR SALE OF LAND SIGNED BY VENDOR ALONE is sufficient, under the statute of frauds, to enable the vendee to enforce it; his own assent to the contract being provable by evidence *aliunde*.

MEMORANDUM READING "I AGREE TO SELL," SIGNED BY VENDOR, describing the land, expressing the consideration and the time of payment and of giving possession, imports an agreement of sale, and not a mere offer to sell, and is sufficient as against the vendor, under the statute of frauds.

MEMORANDUM NEED NOT SHOW CONSIDERATION ALREADY PAID to be good under the statute of frauds.

MUTUALITY OF REMEDY AT TIME OF ACTION brought is all that is necessary to enable a plaintiff to maintain his action on a contract,

REMEDY BECOMES MUTUAL BY FILING BILL OF SPECIFIC PERFORMANCE of a contract for the sale of land upon a memorandum signed by the defendant alone, the bringing of the bill rendering the complainant chargeable as on a memorandum signed by him.

STATEMENTS IN ANSWER NOT RESPONSIVE TO BILL MUST BE PROVED.

AVERTMENT IN ANSWER TO BILL FOR SPECIFIC PERFORMANCE THAT CONTRACT WAS CONDITIONAL on its being approved by the defendant's wife, no such condition being expressed in the memorandum sued on, is not responsive to the bill, and must be proved by evidence independent of the answer.

MEMORANDUM NEED NOT SET FORTH WHOLE CONTRACT, BUT SUBSTANCE ONLY, to satisfy the statute of frauds; and where, in a contract for the sale of land, there was a stipulation that the purchaser was to pay certain annuities charged thereon, the omission of such stipulation from the memorandum signed by the vendor, where the purchaser in his bill admits it and avers his readiness to pay the annuities, is no bar to specific performance.

BILL for specific performance of a contract for the sale of land. The case appears from the opinion.

Binney, Payne, and Ames, for the complainant.

William H. Potter, H. Y. Cranston, and Albert C. Greene, for the defendants.

By Court, BOSWORTH, J. This case arises on a bill in equity, for a specific performance of a contract, the note or memorandum of which is in the following words, viz.: "Mem. 28th of May, 1852. I agree to sell R. H. Ives the Peckham farm, now owned

and occupied by me, say about forty-five acres, in Newport, for fifteen thousand dollars (\$15,000), payable the 25th of March, when possession is to be given. He, R. H. I., paying the annuity for December, 1852."

The bill sets out that the said Charles T. Hazard, being seised and possessed of the farm in question, on the twenty-fifth day of May, 1852, in consideration that the said R. H. Ives would pay him therefor the sum of fifteen thousand dollars on the twenty-fifth of March, 1853, and would pay certain annuities, charged upon said estate, falling due and payable in December, 1852, and would also assume the future payment of said annuities so charged upon said estate, and would pay the same whenever and as they should become due and payable, contracted and agreed with the said Ives to sell him the said farm, to make to him a good title in fee-simple, and give him possession on the twenty-fifth of March, 1853; the title and possession, however, to be subject to the annuities which are a charge upon the estate. The bill avers that the said contract was, on the same day, reduced to writing and signed by the said Charles T. Hazard; and annexes a copy of the alleged contract, which is the note or memorandum above set forth.

The answer unequivocally denies the same; and the respondent avers therein that he never so contracted, and denies that the aforesaid contract and agreement of said Charles T. Hazard, etc., was reduced to writing and then signed by him. It then states in detail the particulars of an alleged interview between the complainant and said respondent, in which the said Ives asked for a price of the Peckham farm, and the said Hazard expressed an unwillingness and a refusal to sell the whole of the Peckham farm, but that he was willing to sell a part of it; that he did say to the complainant that if he was going to sell the whole of it he should ask fifteen thousand dollars for it. The answer admits the signing of his name in pencil in said book, as and for a memorandum of the talk between the parties; sets up that he wrote his name mechanically, without reading the memorandum and without knowing what it contained; alleges haste and confusion, and want of opportunity to read it; and asserts that whatever understanding there was between the parties was intended and expressed by the said Hazard to be upon the contingency that it was approved of and agreed to by his wife. The answer also sets up the statute of frauds.

The first question to which we turn our attention in the consideration of this case is as to whether there is evidence in the

case proving a contract, or some note or memorandum thereof, in writing, signed by a party here charged, for the sale of the land in question. Upon examination of the memorandum produced, and the proofs of its execution, we find an agreement in writing, signed by Charles T. Hazard, to sell the Peckham farm owned and occupied by Hazard, containing about forty-five acres, for a valid consideration expressed, the time when payment is to be made, and when possession is to be given, being definitely fixed. The execution of this instrument, we think, is conclusively proved.

This we deem a sufficient note or memorandum of an agreement to sell the land in question to authorize the bringing of an action, in compliance with the restrictive terms of the statute of frauds. That statute enacts that "no action shall be brought upon any contract for the sale of land unless the promise or agreement upon which such action is brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some person by him thereto lawfully authorized."

Now, there is here proved a contract, or memorandum of a contract, in writing, which is signed by the party here sought to be charged therewith. It is objected that the memorandum is not signed by the other party to the contract; but we do not deem it necessary that it should be signed otherwise than by the party to be charged therewith. Ordinarily, in matters not affected by the statute of frauds, a contract, if it be proved, must be held binding on both parties, though it be not in writing or signed by either party. In reference to a contract for the sale of land, the statute requires that it shall be in writing and signed by the party to be charged therewith, in order to authorize an action upon it. This is all that the statute requires. Authorities are cited to support the proposition that it is not necessary that both parties should sign the contract: 1 Sugd. Vend. 112-114; *Laythorp v. Bryant*, 2 Bing. N. C. 735, 29 Eng. Com. L. 469. But the point does not need to be sustained by authorities. The statute plainly does not require it.

The counsel for the respondent contend that the words of the memorandum import an offer to sell, and nothing more. We think the language imports an agreement to sell. The language is, "I agree to sell;" the consideration is expressed, and the time when possession is to be given is fixed by the memorandum. The mention of the time when possession is to be given, and when the price of the land is payable, indicates that the

parties deemed the agreement a concluded one. The acceptance of the contract on the part of the other party is perhaps implied by the use of the term "agree" in the memorandum by the defendant; for, in order to make an agreement, the assent of two parties is necessary. But we do not deem it necessary that the assent of both parties should appear on the face of the instrument, any further than that the writing should import a contract between the parties, and be signed by the party to be charged therewith. It is in proof that the complainant agreed to take the land at the price named in the agreement. This, we think, upon well-settled principles, may be proved *aliunde* the instrument. The contract was therefore mutual.

The respondent objects that there was no consideration expressed in the instrument moving from the complainant to the defendant. A promise without a consideration, or a nude pact, is void. We do not understand the promise to be of that character. The defendant agrees with the plaintiff to sell the land in question for the sum of fifteen thousand dollars, the said sum to be paid on the twenty-fifth of March, when possession is to be given. True, no consideration had passed from the plaintiff to the defendant; neither had the land, which was the subject of the agreement, passed. The consideration for the agreement to sell the land for fifteen thousand dollars was the agreement of the other party to buy it for fifteen thousand dollars, and the agreement was thus mutual. The plaintiff cannot have the enforcement of the contract without the payment of the sum which was the consideration moving the defendant to make the agreement.

It is no objection that the defendant had not the power to enforce the contract at the time it was made. If he had chosen to have that power, he might have obtained it, or refused to give such power to the plaintiff. The statute of frauds requires that to give a party power to bring an action upon a contract for the sale of land he must have the contract, or some note or memorandum of it, in writing, and signed by the party to be charged. If the defendant had chosen to have his remedy or his right to enforce the contract by action, he should have obtained this requisite wherewith to charge the complainant, as he gave it to the plaintiff, whereby he made himself chargeable.

It is now well settled by authority that mutuality of remedy, existing at the time of action brought, is all that is required to enable a plaintiff to maintain his action; and that where there is a bill for specific performance in a court of equity, the bring-

ing of the bill makes the complainant chargeable as on a memorandum of the contract signed by him. This renders the remedy mutual between the parties at the time when the action is commenced. The cases in which this doctrine is decided and settled are numerous: See *Flight v. Bolland*, 4 Russ. 298; S. C., 3 Cond. Ch. 677; *Batten on Specific Performance*, 62; *Salisbury v. Halcher*, 2 You. & Coll. Ch. 64; *Telfair v. Telfair*, 2 Desau. Ch. 271; 1 Sugd. Vend. 241, 242, 246; 2 Story's Eq. Jur., sec. 736.

The allegations in the answer, of haste and confusion and surprise, are not sustained by the proof in the cause in any manner sufficient to render void the contract. The statements in the answer, setting up a condition of the contract contingent upon the approval of the defendant's wife, not being responsive to the bill, must be proved to have effect. We do not find in the cause any legal evidence to prove that there existed any such condition in the contract between the parties. Such a condition, if it existed, would alter or vary the terms of the written contract, and must, at least, be proved by evidence independent of the answer and declarations of the respondent before it can avail to prevent a decree for the specific performance of a contract in writing: See 2 Daniell's Ch. Pr. 984, note; *Rogers v. Saunders*, 16 Me. 96 [33 Am. Dec. 635]; *Jones v. Bell*, 2 Gill, 120.

It is no bar to the remedy which the complainant here seeks that the memorandum in writing does not contain a specific agreement to pay the future annuities, which it appears are a charge upon the land. That was a part of the contract to be performed by the other party, not by the party signing the memorandum in a manner to be charged therewith. It is not necessary that the whole agreement should be in writing, but the substance of it; "a note or memorandum of the contract," not a detail of all its particulars, is what is required: See *Laythorp v. Bryant*, 2 Bing. N. C. 735, 29 Eng. Com. L. 472; *Atwood v. Cobb*, 16 Pick. 230 [26 Am. Dec. 657].

The complainant, in his bill, admits his agreement to pay the future annuities, and alleges his readiness to do so. If this was a parol condition of the contract to be performed on his part, and he consents to it, the fact that it was not embodied and detailed in the written memorandum is no reason why he should not have a decree against the respondent, he being ready to perform all the conditions of the contract which are incumbent on him: See *Martin v. Pycroft*, 15 Eng. L. & Eq. 378; *London & Birmingham R. R. Co. v. Winter*, 1 Cr. & Ph. 57.

We think, therefore, that there is sufficient proof in the cause

to establish the contract set out in the complainant's bill, and must decree that the contract be specifically performed.

Decree: The decree, in substance, ordered Hazard to convey his title to the premises to the complainant, upon receiving the amount of purchase money stipulated, deducting therefrom the value of his wife's right of dower in the premises, if she should refuse to release the same, such value to be ascertained by the master who settled the conveyance.

MEMORANDUM UNDER STATUTE OF FRAUDS, sufficiency of, in general: See *Pipkin v. James*, 34 Am. Dec. 652; *Idle v. Stanton*, 40 Id. 698; *Craig v. Godfrey*, 54 Id. 299; *James v. Patten*, 55 Id. 376; *Parvill v. McKinley*, 58 Id. 212; *McConnell v. Brillhart*, 55 Id. 601, and cases cited in the notes thereto. See particularly, as to the sufficiency of a memorandum signed by only one of the parties, *James v. Patten*, *supra*, and note.

MUTUALITY OF REMEDY IN SPECIFIC PERFORMANCE: See *Rogers v. Saunders*, 33 Am. Dec. 635; *DeCordova v. Smith*, 58 Id. 136; *Bodine v. Glading*, 59 Id. 749. See also the note to *Kerr v. Day*, 53 Id. 532.

AVERMENTS IN ANSWER NOT RESPONSIVE TO BILL are not evidence, but must be proved: *Sanborn v. Kittredge*, 50 Am. Dec. 58; *Buck v. Swazey*, 56 Id. 681, and notes.

FOSTER v. BROWNING.

[4 RHODE ISLAND, 47.]

REVOCABILITY OF MERE LICENSE TO ENTER UPON AND USE LAND of the licensor, whether it be given by deed or by parol, is a well-settled doctrine of the common law.

PERPETUAL RIGHT OF WAY IS SUBJECT OF GRANT, AND NOT OF LICENSE, and can be conveyed at law only by deed or prescription.

LICENSE PURPORTING TO GIVE PERPETUAL RIGHT OF WAY IS REVOCABLE at law, although money may have been expended upon the faith of it by the licensee in building the way; but it seems that in equity the licensee may have relief upon the grounds of estoppel and part performance of a parol contract.

NEW TRIAL REOPENS ALL ISSUES IN CAUSE when asked and granted in general terms, although some of the issues were found in favor of the party asking for the new trial, and the court will not ordinarily restrict the new trial to the issues found against such party, without the consent of the adverse party.

TRESPASS *quare clausum fregit*. Pleas: 1. The general issue; 2. A prescriptive right of way over the *locus in quo* appurtenant to the adjoining farm of Abiel T. Browning, of whom one of the defendants was tenant, the other defendant being the tenant's servant; 3. A license from one Elisha Watson, former owner of the plaintiff's close, to Abiel T. Browning, his heirs

and assigns, and his tenants, servants, etc., to pass and repass at any and all times over the *locus*, upon faith of which the said Browning had expended a considerable sum in opening and building a passway. The general issue was afterwards waived. The jury found against the defendants on the second issue, and in their favor on the third. The plaintiff moved for a new trial for error in an instruction stated in the opinion. On the argument, the plaintiff asked that the new trial, if granted, should be restricted to the plea of license.

E. R. Potter and Dixon, for the plaintiff.

Urdike and A. C. Greene, for the defendants.

By Court, AMES, C. J. This is a motion for a new trial on the ground of misdirection of the jury by the judge trying the cause, in matter of law. It appears that he, in substance, charged the jury that if they were satisfied that Elisha Watson, the former owner of the *locus*, or so-called servient estate, had licensed by parol Abiel T. Browning, his heirs and assigns, as owners or occupiers of the farm appurtenant to which the right of way was claimed, or so-called dominant estate, forever to use the way, and Browning had expended moneys in opening and building the way on the faith of the license, the license thereby became irrevocable at law by Watson or by the plaintiff, as his successor in title to the *locus*, at least unless the moneys so expended had been first paid back or tendered to Browning; and that notwithstanding any proof that there might be of revocation of the license, unaccompanied by such payment or tender, it afforded a full defense to one of the defendants as the tenant, and to the other as the servant of the tenant, of Browning, against the trespasses complained of in using the way licensed, and in casting down walls built by the plaintiff in obstruction of the same.

We are all of opinion that the learned judge erred in this direction to the jury, and that consequently a new trial of the cause must be awarded. The revocability of a mere license to enter upon and use the lands of the licensor, whether the license be by deed or by parol, is an ancient and well-settled doctrine of the common law. A license of this sort, as such, is revocable in its very nature, without regard to the solemnities with which it is executed. If, however, the right intended to be granted was a fixed, and especially if a perpetual, easement in lands of another, as a right of way, or the like, to one and his heirs, or to one, his heirs and assigns, as owners of a certain

estate, it never was the subject of a license, properly so called, but of a grant, and could be proved or maintained at the common law only by the production of the sealed instrument entitled a grant, or by prescription or long use which supposes such an instrument.

But even if this were questionable at the common law, it is settled here by the statute of this state, Dig. 1844, p. 257, entitled "An act regulating conveyances of real estate," which provides by its first section "that no estate of inheritance or freehold, or for a term exceeding one year, in lands or tenements, shall be conveyed from one to another by deed, unless the same be in writing, signed, sealed, and delivered by the party making the same;" and which further provides, in substance, by the second section, that such conveyances shall be void, except between the parties and their heirs, unless also acknowledged and recorded.

The word "tenements," in the first section of this statute, by its own force, includes everything which may be holden, and so, things incorporate, though they do not lie in tenure: Co. Lit. 6 a; 3 Kent's Com., 4th ed., 401. That this word is thus inclusive, in the sense in which it is used in the statute, is evident from the second section, which, in reference to the same subject-matter, adds the word "hereditaments," the words of that section being "lands, tenements, or hereditaments." The last word, says Coke, "is the largest word of all in that kind; for whatever may be inherited is an hereditament, be it corporeall or incorporeall, reall or personall, or mixt:" Co. Lit. 6 a.

We know not upon what pretense a court of law can hold, against such a statute, a parol conveyance of a perpetual easement in land good because a consideration therefor has passed from the grantee to the grantor; or, to use the language of the common law improperly in application to such a conveyance, that a license of this sort is irrevocable when executed by expenditures made upon the faith that the license will not be revoked, even though it be added, unless such expenditures be first repaid or tendered. Decisions to that effect may undoubtedly be found; but we may say of them, as was said by Mr. Sugden, referring to the statute of frauds, of one of them, *Wood v. Lake*, Sayer, 3, "that they are in the very teeth of the statute:" 1 Sugd. Vend., 7th Am. ed., 97.

The more recent English cases of *Wood v. Leadbitter*, 13 Mee. & W. 838, in the court of exchequer 1845; of *Taplin v. Florence*, 3

Eng. L. & Eq. 520, in the court of common pleas 1851; and of *Ruffey v. Henderson*, 8 Id. 305, in the queen's bench 1851—show that the law is well settled in England in accordance with the views which we have taken; and the opinion of the court in *Wood v. Leadbitter*, *supra*, delivered by Baron Alderson, quite exhausts the whole doctrine on the subject of licenses. The current of authority in this country sets with equal strength in the same direction, as may be seen by referring, amongst others, to the cases of *Cook v. Stearns*, 11 Mass. 537; *Ruggles v. Lesure*, 24 Pick. 190; *Claflin v. Carpenter*, 4 Met. 583 [38 Am. Dec. 381]; *Nettleton v. Sikes*, 8 Id. 34; and *Stevens v. Stevens*, 11 Id. 251 [45 Am. Dec. 203] in Massachusetts; to *Ex parte Coburn*, 1 Cow. 570; *Miller v. Auburn R. R. Co.*, 6 Hill, 61; *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; and *Houghtaling v. Houghtaling*, 5 Barb. 379, in New York; to *Prince v. Case*, 10 Conn. 375 [27 Am. Dec. 675], in Connecticut; to *Barnes v. Barnes*, 6 Vt. 388; and *Leland v. Gassett*, 17 Id. 403, in Vermont; to *Richman v. Baldwin*, 21 N. J. L. 396, in New Jersey; to *Hays v. Richardson*, 1 Gill & J. 366, in Maryland; to *Clinton v. McKenzie*, 5 Strobb. 36, in South Carolina; and to *Woodward v. Seely*, 11 Ill. 157 [50 Am. Dec. 445], in Illinois.

In Maine, New Hampshire, Pennsylvania, and Ohio, and perhaps in some other states, the exploded doctrine of some of the earlier English cases is still maintained at law upon equitable grounds of estoppel, and part performance of a parol contract, which certainly from their inherent justice would commend themselves to our attention as a court of law, had we not full powers as a court of equity to do justice in a proper case of this sort, when applied to on that side of the court. In the recent case of *Weeden v. Babcock* [not reported], in this county, this court sitting in equity, by way of perpetual injunction of a suit at law, specifically enforced a parol contract for the exchange of one private way for another, upon the equitable ground that the contract had been performed by the party applying, and the way having been given up for the purpose of a railway track, and having been thus extinguished because the applicant could not be placed in the situation in which he was before performance on his part. We do not doubt our ability to do full justice in like cases requiring our aid as a court of equity; and we deem it much safer that equities of this sort, often to be nicely adjusted, and sometimes demanding mature consideration, should be administered, through appropriate and flexible remedies, on that side of the court, than by the rougher and less

discriminating intervention of a jury, and scantily as they must be, in the unyielding forms of the common law.

The motion for a new trial in this case is in general terms, and if granted as asked, will open to the jury who are to try the cause all the issues which are made up in it. We were asked, however, by the applicant for a new trial at the argument, inasmuch as a prescriptive right of way appurtenant to the farm of Abiel T. Browning, in whose right the defendants justify, is pleaded, and has been found against them, to limit the new trial to the plea of license, and allow the verdict to stand as to the plea first named. This would be in effect to order a judgment to be entered up against the defendants, except so far as the mere question of the amount of damages is concerned. Now, although it is true that in granting new trials we are expressly empowered by statute to grant them under such restrictions and conditions as we may prescribe, Dig. 1844, pp. 89, 90, it is not unusual, at least when they are granted for causes not involving any fault of the court, to impose proper conditions upon the applicant in the way of costs, or even of limiting the issues, or points under the general issue, to be opened to him in the new trial: *Hutchinson v. Piper*, 4 Taunt. 555; *Thwaites v. Sainsbury*, 7 Bing. 437; *Baxter v. Nurse*, 6 Man. & G. 940-942; *Winn v. Columbian Ins. Co.*, 12 Pick. 287, 288; *Robbins v. Townsend*, 20 Id. 351; *Allen v. Mapes*, 20 Wend. 633-634; or to grant them unless the other party releases an excess of damages, or does some other justice in the cause, and so to impose a condition upon him, if he would prevent the new trial: *Stephenson v. Mansony*, 4 Ali. 317, 318; yet where, as in this case, the ground upon which the new trial is granted is an error of the court, it at least is not customary to impose any conditions upon the applicant, unless, indeed, the court has acquired a right so to do by his previous consent: *Baxter v. Nurse*, *supra*; *Tuttle v. Gates*, 24 Me. 395, 397, 398; but see *Robbins v. Townsend*, *supra*.

We are not aware, however, of a practice anywhere which authorizes the court to fix any terms whatever upon the party against whom the application is made, unless by way of an alternative, which he must accept or endure the new trial. Certainly it was never known that the party applying could have the issues found against him opened, whilst those in his favor were to stand against his adversary, who asked no indulgence and received none in return from the court, when it was employed merely in correcting its own error. At all events, no such prac-

tice has been known in this state, and this is not a case which appeals to our discretion to introduce it. The plaintiff has thus far disclosed no equities which aid him in obtaining from us advantages in his pursuit of the defendants. He stands upon the strict law, to which he is entitled, and we are not disposed to abridge the chances of the defendants in successfully resisting this action upon any of the issues which the record as originally made up opens to them. A new trial generally is therefore awarded.

REVOCABILITY OF LICENSE RESPECTING REALTY: See *Addison v. Hack*, 41 Am. Dec. 421; *Wilson v. Chalfant*, 45 Id. 574; *Lowe v. Miller*, 46 Id. 188; *Woodward v. Seely*, 50 Id. 445; *Hazellon v. Putnam*, 54 Id. 158; *Bush v. Sullivan*, Id. 506, and cases cited in the notes thereto. The principal case is cited to the point that a mere license, whether by deed or parol, is always revocable, unless coupled with an interest and executed, in *Kamphouse v. Gaffner*, 73 Ill. 461. It is cited also in *Snowden v. Wilas*, 19 Ind. 14, to the point that though a parol license amounting in terms to an easement is revocable at law as to future enjoyment, and is determined by a conveyance of the estate, it is not always so in equity, but that in equity courts the future enjoyment of a parol license granted upon consideration, or on faith of which money has been expended, may be enforced if adequate compensation in damages cannot be made. The language of the principal case as to the equitable rule and practice upon this point is quoted in *Lane v. Miller*, 27 Id. 537, where it is held that in Indiana, where a parol license is given, upon the face of which money is expended by the licensee, the licensor will be estopped from revoking the license unless the licensee can be placed *in statu quo*.

PAROL AGREEMENT FOR EASEMENT, VALIDITY OF, GENERALLY: See *Harris v. Miller*, 33 Am. Dec. 138; *Pitkin v. Long Island R. R. Co.*, 47 Id. 320; *Hazellon v. Putnam*, 54 Id. 158. The principal case is cited in *Appeal of North Beach etc. R. R. Co.*, 32 Cal. 506, to the point that an easement is an estate or interest in land within the statute of frauds requiring contracts affecting real property to be in writing.

TILLINGHAST v. CHAMPLIN.

[4 RHODE ISLAND, 173.]

PARTNERSHIP RECEIVER, APPOINTED IN SUIT BY REPRESENTATIVE OF DECEASED PARTNER against the surviving partner to compel a settlement of the affairs of the partnership, and the application of its property to its debts, is an officer of the court, invested with the whole equitable title to the firm assets without an assignment; represents, in any suit affecting the partnership property, the interests therein of all parties to the suit in which he was appointed, if not of persons who are not parties; is clothed with all the rights and equities of the deceased partner, for the purposes of his trust; and may sue, without leave, in this country, to obtain possession of the partnership property for the purpose of applying

it to the partnership debts, and need not, on a bill filed for that purpose, join the representative of the deceased partner as a party.

PARTNERSHIP CREDITORS HAVE NO LIEN, WHILE PARTNERS ARE ADMINISTERING their own funds, on the joint property for the payment of their claims, nor have creditors of individual partners any lien upon their separate property, or any priority of payment out of it.

PARTNERSHIP CREDITORS HAVE EQUITABLE LIEN IN CASE FIRM IS DISSOLVED BY DEATH of a partner, or in case of the bankruptcy or insolvency of one or all the partners, upon the joint property of the firm, and separate creditors have a similar lien and priority as to the separate property of the partners.

COMPLAINANT CANNOT HAVE RELIEF ON ANOTHER GROUND, WHERE BILL CHARGES ACTUAL FRAUD as the ground of relief and the fraud is not proved, but the bill must be dismissed with costs, and this though the word "fraudulent" is not used, if the facts alleged and the relief asked show that fraud is the real ground of complaint; but where such a bill is filed by a partnership receiver, under legal advice, and in the interest of creditors, to recover assets alleged to have been fraudulently transferred, it will be dismissed without prejudice, and costs will be allowed out of the partnership fund.

REALTY CONVEYED TO PARTNERS AS CO-TENANTS IS PARTNERSHIP PROPERTY, in equity, where it is purchased with partnership funds for the use of the firm.

DECEASED PARTNER'S SHARE OF SURPLUS OF PARTNERSHIP REALTY, after the payment of the firm debts and the adjustment of the mutual equities of the partners, is regarded in American courts of equity as realty, and descends to the heir, but the rule seems to be otherwise in England.

BONA FIDE PURCHASER OF PARTNER'S LEGAL TITLE IN PARTNERSHIP REALTY, conveyed to the partners as tenants in common, having no notice of the equitable rights of the copartners or partnership creditors in the land as partnership property, will be protected in equity as well as at law.

SURVIVING PARTNER MAY DISPOSE OF PARTNERSHIP REALTY for the payment of partnership debts, and of any balance due him as a partner, if the legal title is vested in him, and if not, equity will assist him by compelling a conveyance of the legal title to himself or to a purchaser from him.

PURCHASER OF PARTNERSHIP REALTY FROM SURVIVING PARTNER, though he knows it to be partnership property and that there are partnership debts to be paid out of it, if he honestly buys it and pays for it, without knowledge or notice of any facts indicating an intent by the surviving partner to misapply the funds, will be protected, although such surviving partner does in fact appropriate the money to his own use, leaving the debts unpaid; but where he purchases either the whole of such realty or the surviving partner's undivided legal interest therein, knowing it to be partnership property, and that the firm is nearly or quite insolvent, and receives the conveyance, and pays the purchase money secretly, and at night, under circumstances indicating knowledge of the fraudulent designs of the surviving partner, who immediately absconds, leaving the firm debts unpaid, such purchaser takes the property subject to the trusts under which it was held by his vendor.

BILL by a receiver of partnership property to subject certain realty purchased by the defendant from the surviving partner of the firm to the payment of the partnership debts. The case appears from the opinion,

Cozzens, for the complainant.

Blake, for the respondent Champlin.

By Court, AMES, C. J. This bill is brought by the plaintiff, as receiver of the late firm of Gardner & Brother, of East Greenwich, housewrights. He was appointed to this receivership by a decretal order of one of the justices of this court, on a bill filed by George C. Kenyon, administrator of William A. Gardner, the deceased partner of the above firm, against Benjamin W. Gardner, the surviving partner, for the administration of the partnership property, and to compel the application of the same to the payment of the copartnership debts. He is therefore an officer of this court, invested with the whole equitable title to the partnership property without an assignment, and in this suit certainly represents the interests in that property of all parties to the suit in which he was appointed, if not of all persons not parties thereto: *Hutchinson v. Lord Massareene*, 2 Ball & B. 55; *Davis v. Duke of Malborough*, 2 Swanst. 118; *Green v. Bostwick*, 1 Sandf. Ch. 186; *Mann, Receiver, v. Pentz*, 2 Id. 271, 272; *Waring v. Robinson*, 1 Hoffm. Ch. 532; *Iddings v. Bruen*, 4 Sandf. Ch. 422-427, in which last case see a full discussion of the interest and power of a receiver of copartnership property in and over it. According to what is understood to have been the old English practice, and at all events the most convenient practice, and that generally adopted in this country, he may, in order to enable him to perform his trust, *suo motu*, and without special leave (which he must, according to the present inconvenient practice in England, obtain from the court appointing him), bring suits to possess himself of the estate to which he is officially entitled, incurring no risk except as to costs; and, least of all, have the persons sued a right to object that he brings his suit without such leave: *Green v. Bostwick*, 1 Sandf. Ch. 186; *Iddings v. Bruen*, 4 Id. 424-426. There is no danger in this; for, as an officer of the court, he is always subject to its control upon proper application, and if he recover or possess himself of property, it is in *custodia legis*, and subject to administration by order of the court.

Now, the representative of the deceased partner, who brought the bill under which this receiver was appointed, had a clear

right in equity to have the property of the firm of his decedent applied, in relief of the estate represented by him, to the payment of the copartnership debts: *Egberts v. Wood*, 3 Paige, 526 [24 Am. Dec. 236], per Walworth, chancellor. When that representative obtained the appointment of a receiver, he surrendered all his dominion over the firm property, so far at least as suit in equity was concerned, into the hands of the receiver; who, by virtue of his appointment thus made, became, at least, invested with all the rights and equities of the deceased partner, for the purposes of the trust with which he was clothed: *Waring v. Robinson*, 1 Hoffm. Ch. 532.

We make these remarks *in limine* as to the legal *status* of the plaintiff to this bill, because one point taken in defense to it is that the plaintiff, as receiver, represents only the creditors of the late firm of Gardner & Brother—that the creditors of a firm have no equitable lien upon the copartnership property for the payment of their debts, but can only work out such a lien through the equities of the copartners, who must, therefore, in some form, be represented in the bill; and many authorities are cited to the last part of this proposition. Now, if the rule just referred to had any application to a case like the present, surely no one could more completely represent the equitable right of the deceased copartner to have the copartnership property applied to the payment of the copartnership debts than a receiver, appointed by this court, upon the bill, and at the instance of the legal representative of the deceased copartner, and invested by virtue of his appointment with all the rights and equities both of the decedent and of his representative.

But we apprehend that the rule in question has no application to the case of a copartnership dissolved by the death of one of the copartners, especially if the surviving partner be insolvent, or where, though living, one or both of the copartners become bankrupt, or where they are discharged under insolvent acts, so that their property is placed in the hands of the assignees appointed by law to make distribution thereof. It is true that whilst the copartners are administering their own funds the copartnership creditors have no lien upon the joint effects; nor have the creditors of the individual partners any lien or priority of claim upon the separate property of their respective debtors; but when, as in case of dissolution of the copartnership by death, a trust is created by implication of law, as to the joint property in the hands of the surviving partner, of which he is the trustee and the joint creditors are the *cestuis*, or when, as in case of

bankruptcy or insolvency of either or both of the copartners, the property passes into the hands of assignees by way of an express trust for the benefit of all parties according to their equitable rights, a lien attaches in equity at once, according to those rights, upon the joint property in favor of the joint creditors, and upon the separate property in favor of the separate creditors of the copartners. This lien is, we think, familiarly administered in equity in favor of those respectively entitled to it, upon their own direct application, and as their own equitable right. Even the courts of law administer it in New England, under our attachment laws, in case of *quasi* insolvency, by giving to the creditor of the firm, though subsequently attaching the firm property, a priority of lien and payment upon and out of such property over the separate creditor of one of the copartners first attaching it, thus setting aside the legal right of prior attachment in favor of the equitable lien of the copartnership creditors upon the copartnership property. And see *Kirby v. Schoonmaker*, 3 Barb. Ch. 47-51, *per* Walworth, chancellor; *Wilder v. Keeler*, 3 Paige, 167, 170-176 [23 Am. Dec. 781]; *Hall v. Hall*, 2 McCord Ch. 302.

But however this might be were this a case in which the creditors of the firm were the only applicants to the court for the enforcement of their supposed lien upon the copartnership property, there can be no doubt but that the plaintiff in the case before us, as a receiver appointed by the court upon the bill of the administrator of the deceased partner to compel a proper administration of the assets of the firm, and their application by the surviving partner to the payment of the copartnership debts, completely represents the equitable rights of the administrator and of the intestate in that respect, and that the objection to the relief prayed for by this bill, on that ground, totally fails.

Having disposed of this preliminary objection supposed to exist from a want of equitable interest in the applicant for our aid, we propose to look into this case upon the bill, answer, and proofs, and to ascertain what the plaintiff asks and upon what grounds; and whether he is entitled against the respondent to what he claims, or to any relief upon the grounds upon which he asks it. The cause has, upon the main point supposed to be involved in it, been very fully and ably argued at the last hearing by the counsel on either side, and much labor has been saved to us by their full citation and lucid exposition of the authorities upon which they respectively rely.

The bill, besides stating the facts which relate to the formation of the late firm of Gardner & Brother, to the death of William A. Gardner, one of the copartners, the insolvency of the firm at his death, and to the plaintiff's appointment as receiver, in substance alleges that after the death of his brother and copartner, Benjamin W. Gardner, the surviving partner, took sole possession of all the property of the firm, including a certain lot of land, with a planing, grist, and saw-mill upon it, with their machinery and fixtures, and continued to carry on the business of the firm with the property of the firm, notwithstanding the dissolution of the copartnership by the death of his copartner; contracting new debts on account of the firm, but paying none of the old ones, and that these were at the time of the conveyance hereafter to be spoken of, as well as at the death of William A. Gardner, outstanding to a large amount. It further alleges that the planing, grist, and saw mill, with their fixtures and machinery, are in the possession of the respondent Champlin, who holds the plaintiff out of the same, claiming the same, or some interest in the same, by virtue of a certain deed of the date of the eighth of June, 1855, executed by Benjamin W. Gardner, the surviving partner (named in the bill as a defendant), and which purports to convey an undivided half of that property to Champlin for the "pretended" consideration of one thousand two hundred and fifty dollars; and that "said pretended sale was made by the said defendants with the design and intent that said Gardner (the surviving partner) should appropriate said sum to his own use, and carry the same away with him as hereinafter mentioned, and said deed was executed at ten o'clock, and the said Gardner left the state immediately afterwards."

The bill afterward alleges "that immediately after executing the said pretended conveyance to the said Champlin on the eighth day of June, 1855, the said Benjamin W. Gardner abandoned the concerns of said copartnership, absconded from said East Greenwich, conveyed or accompanied by said Champlin out of town, carrying with him a large amount of money, including said one thousand two hundred and fifty dollars, the pretended consideration of said conveyance, and all the proceeds of the effects of said copartnership," etc. Again, after setting forth the equitable lien of copartnership creditors upon the property of a firm in the hands of the surviving partner, and the trust for them with which such property in his hands is clothed, and the consequent equitable duty of Benjamin W. Gardner, as surviving partner, in the

administration of the assets of the firm, and that the property and effects so pretendedly conveyed to Champlin are in his hands chargeable with the same trusts as in the hands of the surviving partner, Benjamin W. Gardner—all of which, it will be noticed, are mere conclusions of law, properly drawn from the facts above recited as alleged in the bill—the bill goes on to charge the defendant Champlin, at the time of his pretended purchase, not only “with full notice” of the trusts under which Gardner, who executed the deed to him, held the copartnership property, as matters of law he was bound to take notice of, but “that he (Gardner) did not intend to apply the proceeds of said pretended sale to the payment of the debts of said copartnership, but to his own use, and to abscond with the same.” It is true that the bill then immediately goes on to charge Champlin with notice of the existence and carrying on of the copartnership, of the death of William A. Gardner, of the alleged fact that Benjamin W. Gardner, as surviving partner, continued to carry on the business of the firm, of the fact that the property pretended to be conveyed to him was copartnership property, and that the firm owed a large amount of debts at the time of the death of William A. Gardner, and continued to do so till and at the time of the conveyance; but these last allegations are connected with the previous ones by the form of the expression, which is “and at the time of the said pretended conveyance to him, as before shown.”

The bill then goes on to aver that Gardner had no right to make and execute the said pretended deed “of said undivided half of said real and personal estate, and of other personal estate in the manner above shown, and the same ought in equity and good conscience to be declared null and void, and set aside accordingly, and the said property and effects described therein ought to be applied, when sold, to the payment of said copartnership debts.”

The concluding averment of the stating part of the bill, as it was originally filed, is, “that said pretended deed,” executed etc., “is a fraudulent conveyance as against said copartnership creditors, and as such ought to be set aside accordingly;” and then, to show in what sense it is intended that it was fraudulent, is introduced immediately thereafter, by amendment, the following statement: “And your orator further shows that the said Benjamin W. Gardner, before he left East Greenwich, in June last, left with said Samuel A. Champlin a power of attorney empowering said Champlin to defend all suits and attend to other matters for him.”

The second, third, fourth, and fifth interrogatories of the bill are directed to the discovery from Champlin of his knowledge of Gardner's intent to abscond with the purchase money, and of his alleged aid in getting him off, and of the amount of money he carried off; and an interrogatory, filed at the same time with the amendment as to the alleged power of attorney left by the latter with the former, is pointed to the purpose of discovering the existence of such a power, and of compelling its production. The prayer of the bill is that a decree may be passed declaring the deed of June 8, 1855, "to be null and void, and ordering the same to be surrendered to be canceled, and the property and effects purporting to be conveyed thereby to be wholly exonerated and discharged therefrom, and sold, and the proceeds applied, or that the said sum of one thousand two hundred and fifty dollars may be paid by the said defendants and applied, to the payment of the debts of said copartnership," and for an injunction restraining Champlin from disposing of the same, and for general relief.

We have been thus special in our analysis of this bill, for the purpose of showing that it is not, as contended by the counsel for the complainant, a bill framed with a double aspect—charging either an actual or a constructive fraud—or which leaves any pretense from its allegations, if that would make any difference, of its being treated by us in that way. On the contrary, in all its parts, from the first of the stating part to the prayer, inclusive, with perfect unity of design, this bill charges the respondent Champlin with the gross fraud of conniving with the absconding partner to cheat the creditors of the late firm of Gardner & Brother, by taking a conveyance of partnership property from him when he was upon the point of absconding, and with full knowledge of his design to carry off for such a purpose the proceeds of the sale; and in furtherance of this design, that he both made the purchase and assisted him to get away, retaining a power of attorney to enable him to defend both, as well as he might, against the consequences.

Now, the answer specifically denies every fact and intent stated as constituting this actual fraud; and except the fact that Gardner did abscond with the purchase money on the night of, or during the morning after, the deed in question was executed, and that there seems to have been some parade before the justice of the peace who witnessed and acknowledged the execution of the deed by the grantor of paying the consideration money in his presence, and of having him to count the

same, there is no proof, although some was attempted to be made, which affects the respondent with actual participation in the fraudulent scheme of Gardner. We do not think that the mere circumstances which we have stated are sufficient to overcome, in a court of chancery, the technical force of the sworn answer; and it being proved to our satisfaction that the respondent had previously, at auction sale, purchased of the administrator of the deceased partner and the surviving partner jointly, and paid for, the movable property connected with the planing-mill, etc., thereby showing an open design of becoming the purchaser, if he could, of these works; and it being also shown by proof that from the nature of his business he was likely to become, and from his means in hand he was able to become, the purchaser, and to pay for such a property, we have all come to the conclusion that we cannot find the intent and participation charged to be proved, and that we cannot therefore give relief upon the grounds stated in the bill.

The question which then arises is, whether, dropping this charge, which veins and intermingles with the whole frame and texture of the bill, and rejecting it as surplusage, we shall be justified, by the rules of the jurisprudence which we here administer, if on the allegations of the bill we can find some inferior ground of relief than the actual fraud charged of giving relief on that ground under this bill. It is said by the counsel for the complainant that we may and ought, and he seems to argue as if, refusing to do so, we should be guilty of sacrificing the inherent justice of the case to a mere rule of chancery pleading and practice. Now, grant that this be so, what right have we to dispense with rules established by wisdom for our guidance in the exercise of a jurisdiction which, considering the fallibility of human judgment, necessarily leave us quite latitude of discretion enough? Whilst, on the one hand, we know no system of jurisprudence more beneficial in its administration than that of the English chancery, governed, as it is, by fixed and certain rules and principles, and flexible only to circumstances in the modes of relief of which its forms render it capable, we know of none, considering its power of specific action, which would become so oppressive, if, flexible in principles and rules as well as in its modes of relief, it were so altered as to make the chancellor the tyrant, instead of the judge of the causes before him.

Whilst the door of the court has always been left wide open to relieve those who suffer from acts or practices of fraud—a great head of its jurisdiction—it has always been most careful

to require of those who apply to it on this ground to scrutinize their causes of complaint before they enter it, and to allege and thus give notice, on the one hand, of that which they intend to prove, and to prove, on the other, that which they have alleged as the ground of the relief applied for. In *Montesquieu v. Sandys*, 18 Ves. 302, 309, 312, 314, which was a bill brought by a client against an attorney to set aside a purchase made by the latter of the former's interest in an advowson, which had, by accident, turned out very advantageous to the purchaser, Lord Eldon had occasion to state and apply the first branch of this rule.

The case stated in the bill was, that the attorney, in the course of his employment, had gained a knowledge of the value of the right sold, which his client had not, and misrepresented the value to him, and that the client, ignorantly confiding in the representation, made an unreasonably low, as it turned out to be, proposal to sell, which the latter had availed himself of proposing to deduct the price from his solicitor's bill for services which had not then been delivered. It appeared from the answer and proofs that the attorney, though employed by the plaintiff in some other matters, had gained no such knowledge as charged, and had made no such misrepresentation of value; and that the bargain had been made by both in equal ignorance; but that the purchase money was paid by deductions from the bill of the attorney not then delivered, which, at the time of the bargain, was not equal to it, though the bill became large enough some three years afterwards, so as upon final settlement then to absorb the purchase money, and leave a balance paid by the client in money. At the time of the execution of the conveyance no money was paid, but a receipt for the amount of the purchase money was given by the client to the attorney, as if it had been actually paid by the latter; when in truth it was only understood at the time that it was to be deducted from the bill of the attorney, not then equal to it, when that bill should be delivered and settled. Lord Eldon thought that if these last facts, or the case made by them, had been stated in the bill, relief might have been granted, upon the principles established in equity, with regard to dealings between attorney and client; but that the case stated not having been proved, "though," to use his own words, "the transaction as to the receipt was very incorrect, it would be far too much to give relief upon those circumstances which are not made a ground of complaint upon the record." He dismissed the bill, however, without costs.

So strict is this rule, as a general rule in chancery practice, that nothing can be proved which is not stated by the bill, unless it is put in issue by the answer, that in *Powys v. Mansfield*, 6 Sim. 565, 9 Eng. Cond. Ch. 565, 566, the vice-chancellor ruled that in such a case evidence could not be read to prove the fact even on behalf of an infant. This branch of the rule of equity pleading and practice referred to, that is, that branch applicable to pleadings wanting in allegations sufficient to give notice of and afford a basis for the proof upon which relief may be given or the defense may stand, is alike applicable to all other cases as well as to cases of fraud. The other branch of it is, however, specially applicable to alleged cases of fraud, in the sense of actual deceit or covin. It is thus laid down by Lord Truro, in *Price v. Berrington*, 7 Eng. L. & Eq. 260, as "an established doctrine of the court." "When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated." The rule is spoken of by his lordship as one repeatedly recognized, especially by Lord Cottenham, and as then (1851) lately acted upon in the case of *Gibson v. D'Este*, in the house of lords—a case, by the way, with which his lordship must have been quite familiar, as the bill filed in it charged fraud in the sale of a piece of land upon the lady who subsequently became his wife, and is reported under the name of *Wilde v. Gibson*, in 1 Cl. & Fin., N. S., 620. This rule, it will be noticed, does not suppose the bill to be defective in allegations to be met by proof establishing another ground of relief than that of actual fraud, but to be full in that respect; the difficulty being that these allegations are pointed with the others to such fraud, as the distinct ground of the relief which the bill invokes. Nor is the rule, as was remarked by counsel in *Price v. Berrington*, 7 Eng. L. & Eq. 255, "founded on any martinet principle of pleading." On the contrary, Lord Cottenham, speaking of it in *Glascott v. Lang*, 2 Phill. 310, "as a rule generally acted upon," propounds it also "as founded in justice," "because," he continues, "the door of this court being always open to allegations of fraud, it would be unjust, and much to be deprecated, to afford any encouragement to such allegations by allowing a party to try the experiment of obtaining relief on that ground, and if it failed, to fall back upon his bill for some inferior kind

of relief." This we deem to be sound morality, and fit to be observed by those who sit in the gateway of the court of chancery to administer the high-toned justice of that court.

Now this rule, and upon the very ground given for it by Lord Cottenham, was adopted and applied by this court in the case of *Mount Vernon Bank v. Stone*, 2 R. I. 129, 132, 133, decided at the March term for this county, 1852; but is supposed by the counsel for the plaintiff in this case to have been dispensed with by the court in the case of *Masterson v. Finnigan*, Id. 316, 318, 319, decided at the September term of the court for this county in that very year. It is to be regretted that the grounds of the decision of the court in the last-mentioned case, of which we have only the reporter's statement, were not more fully and distinctly given; because, as given in the report, they do seem to imply the strange power in the court of dispensing with an established rule of justice, just recognized by them, upon some loose notion of hardship, although the application of the rule be invoked by the very party for whose protection it was in part, at least, established. It is true that in *Glascott v. Lang*, *supra*, which was a bill for the cancellation of a bottomry bond, on the ground of fraud—the bond being then in suit in the court of admiralty—Lord Cottenham did, as the amount was small, to save expensive litigation, propose to the parties, notwithstanding the objection to relief above stated, that they should allow the bill to proceed and have the whole matter adjudicated under it. The defendants were ready to agree to this, because, as stated by their counsel, "as the amount of the bond was in court, the effect of dismissing the bill at once would necessarily be to restore the fund to the plaintiffs and leave his clients without any security for payment, even if they should succeed in the court of admiralty; the ship having been sold and the proceeds received long ago by the plaintiffs." The plaintiff, however, refused by his counsel to assent to the inquiry through a master under the bill, as proposed by the chancellor, and preferred that the bill should be dismissed; notwithstanding which, the chancellor retained the bill at the request of the defendants, and ordered the proposed inquiry to be made. The mode in which Lord Cottenham dealt in this case with the bill before him is not, as has been argued before us, any authority for our retaining this bill, if faulty in the same way, at the instance of the plaintiff, whose bill it is, against the objection of the defendant. On the contrary, he put the bill at the disposition of the defendants, to have it dismissed upon the

ground stated, if they required it, or to have it retained and their rights ascertained under it, if they deemed that their interests would be better subserved by such a course.

Upon examining, too, the very imperfect report of the facts in the case of *Masterson v. Finnigan*, 2 R. I. 316, the decision of the court will be found to require no such assumption of dispensing power as the report makes the court claim as the ground of their judgment. The bill in that case, as the subject of the relief prayed by it, embraced two adjoining parcels of land, of the larger of which partition had been made by a sealed agreement, which the bill sought to set aside, on the ground that the plaintiff was induced to execute it by the false and fraudulent representations of the plaintiff that the instrument in question provided for a full and perfect partition of the entire premises, including the smaller lot adjoining; and the bill prayed that a new partition of the whole might be made. The answer denied the fraud charged, and stated, by way of defense, that the instrument did include, and was intended to include, the smaller lot in the partition made by it; and that it was designed that the plaintiff should have one half the premises conveyed by it to her. There was no proof of the fraud charged in the bill, or that it was not designed that the one half of the smaller lot should have been included in the instrument of partition, except that as construed by the court it did not include it. In this state of things, the court refused to relieve against the agreement of partition executed by the plaintiff of the larger lot, but retained the bill for the purpose of making partition of the smaller lot, not included in the agreement; giving the defendant costs up to the time of the decree ordering the partition. The allegations of the bill, in other words, were not intended to apply, and did not apply, so far as they charged fraud, to but one of the lots mentioned in it; and showed a case for partition of the other as an inseparable incident of a joint estate at law and in equity. The court enforced the rule adopted in the case of *Mount Vernon Bank v. Stone*, Id. 129, as to all the relief claimed upon the ground of fraud; but as to that claimed in relation to the other subject embraced in the bill, and upon other grounds to which the unproved allegations of fraud did not and could not apply, granted the relief asked upon payment of costs up to the time of the decree for it. We do not think that this course militates at all with the rule as it seems to have been administered, at least by Lord Cottenham. In *Ferraby v. Hobson*, 2 Phill. 255, S. C., 22 Eng. Ch. 255, 258, 259, he ex-

amines the bill, which was a bill against a trustee to ascertain whether it did, as argued by the counsel for the plaintiff, make a case of mere neglect or omission of duty as distinct from the charge of personal corruption contained in the previous part of the bill; and although he found there was a charge in it that taken by itself would bear that construction, yet that, taken in its context, it had reference exclusively to the charge of personal corruption.

In *Masterson v. Finnigan*, 2 R. I. 316, the fraudulent misrepresentations charged related to, and the relief prayed for upon that ground applied only to, one of the two lots of land named in the bill; and of the other lot, of which partition was also asked, it was asked for upon the general right of one tenant in common to have partition of the joint estate as against another. The very nature of the case confined the allegations of fraud to the other subject of the bill; and where this is so, we see no reason from the rule of doing more than was done—in effect, dismissing the bill with costs as to that subject to which the unfounded or unproved allegations of fraud exclusively related, and retaining it and giving relief as to the other subject of the bill. The decision, therefore, instead of being an authority against the rule and principle of practice we are considering, is, when rightly viewed, in entire conformity to that rule, and an authority for it. Since the first judicial application of this principle in this state, it has been applied by the learned judge of the first circuit court of the United States in *Fisher v. Boody*, 1 Curt. 206, 211–223; by the supreme court of the United States in *Eyre v. Potter*, 15 How. 42, 56; and again by the house of lords on appeal, their decision having been pronounced by Lord St. Leonards, then lord chancellor, in *Curson v. Belworthy*, 22 Eng. L. & Eq. 1, 5, 7, 11. This last case is not otherwise remarkable than that the plaintiff, a poor uneducated man of small capacity, and who sued in *forma pauperis*, sought to set aside a conveyance of a cottage and small piece of land, made by him to a creditor at a considerable under-value, without the advice of an attorney, and soon after it had come to him by the death of his father. Prior to his coming into this small estate the plaintiff had executed a common money bond to the defendant, to secure a small sum of money in which he was indebted to him, and the point of the charge of the bill, the plaintiff acting in ignorance, was that the defendant had, by false representations to the plaintiff and others, induced the plaintiff as well as others to believe that he had by the money bond entered into a contract

to sell the estate when a mere expectancy, at a price only adequate to the value of an interest of that kind from which he could not escape when he came into the full possession of the property. The bill set forth other circumstances, with a view to show that the purchase had been obtained by misrepresentation and fraud. The proof of fraud failing, Lord St. Leonards said that if the case had been originally brought forward as a case of a contract improvidently entered into, and hastily carried into execution, it might have had a different result; yet as it had been stated, and attempted to be proved, as a case of absolute fraud, and the appellant had failed to make out the allegations of fraud in his bill, though the case was certainly one of hardship, he must advise the house to dismiss the appeal.

In almost all these cases it will be found that the objection to relief was not that the bill did not contain allegations sufficient to afford a basis for the inferior or secondary relief upon which the plaintiff wished to fall back, but that having mingled with those allegations imputations of personal corruption or actual fraud, he had pointed his bill only to relief upon this higher ground, and must therefore succeed upon that ground or not at all. We do not apprehend that it is the mere use of the word "fraudulent," or the omitting to use it, which will decide whether the bill points or not in such a direction. The word may be used in such a context as to indicate that no more is intended by it than such constructive fraud as courts of equity raise upon certain facts, or imply from contracts between parties in certain relations, and which, from a policy based upon a wide and various experience, such courts deal with as fraudulent in law in order to ward off the danger even of the perpetration of actual fraud. The word "fraudulent" may not be used, and yet the facts alleged may, especially when coupled with the species of relief that is sought, indisputably show that the ground upon which relief is sought is the actual fraud or personal corruption of the defendant in the transaction impeached in the bill. Based, as we have seen, upon a principle, the rule in question deals not with mere words or forms of expression. In equity pleading there is great latitude in the use of these, unknown to the old-formed actions of the common law, or even to those actions of the case which have grown out of the equity of the statute of 2 Westminster. There is more difficulty, therefore, in detecting the true ground or grounds upon which relief is sought in courts of equity than in the courts of law; but when detected, the result in the former is precisely the same as in the latter, as

to charges of deceit or fraud. In either forum, if they are the ground of the action, they must be proved; or however good may be the case of the plaintiff if brought forward in another way, he must fail in the way in which he has chosen to put it. We have discussed this question more at large in this case than its difficulty would seem to require, because of the supposed contradiction with regard to it of the two cases before referred to as decided by this court, and because of its frequent occurrence here—twice in cases argued before us during this very fall circuit.

We have already commented upon the frame of this bill, and have come to the conclusion, considering, in addition to what we have already said of it, that the special relief prayed is that the deed impeached may, in effect, be declared "to be null and void," and "be surrendered to be canceled, and the property and effects purporting to be conveyed thereby be wholly exonerated and discharged therefrom and sold," etc., relief proper in this court only in case of actual fraud, that it does distinctly put forward as the sole ground of relief a gross case of actual designed fraud on the part of the respondent Champ-
lin, in the taking of the deed, which the proof, though attempted to be made, has failed to establish. Under such circumstances, the course established for us by our own decisions, and by decisions of the highest authority elsewhere, is that this bill must be dismissed with costs; but as the bill has been filed by an officer of this court under legal advice, in pursuing the interests of a numerous body of creditors, who, together with himself, are in no fault in this matter, it must be dismissed without prejudice to any proper application made by him in their behalf, and the costs will be allowed to the plaintiff out of any funds which have come, or may come, into his hands as receiver.

As the matter of this bill may come before us in another form, and the other questions involved in it have been very fully and elaborately argued on either side, it may be as well for us now to express our opinion with regard to them for the future direction of the parties, and with the hope that it may put an end to further litigation. These questions are: 1. Was the lot of land, with the planing-mill, saw-mill, and grist-mill upon it, with their fixtures and machinery, in equity, the property of the late firm of Gardner & Brother? or was it the joint property of the two members of that firm, held by them, and therefore they to be treated by us in respect to it, as

tenants in common? and 2. If partnership property, has the respondent acquired a title to an undivided half of it by virtue of the deed from Benjamin W. Gardner, the surviving partner, under such circumstances as exonerate it from the trust with which it was clothed in favor of the creditors of the firm whilst in the hands of his grantor, or under such as keep it subject to that trust in his hands.

With regard to the first of these questions, which is principally a question of fact, we entertain no doubt upon the proofs submitted to us. As no articles of copartnership have been produced, the precise day or month, even, in which the copartnership of Gardner & Brother was formed does not appear; but that such a partnership existed some time prior to the death and up to the death of William A. Gardner is admitted; and that this copartnership was in fact formed some time prior to the nineteenth day of December, 1851, and in the fall of that year, is abundantly proved by the course of dealing of William A. and Benjamin W. Gardner, as copartners, sworn to by the three Hunts, Wall, Salisbury, and Pearce, witnesses whose depositions were taken and read on behalf of the complainant. It appears from this testimony that as early, at least, as September, and certainly in the month of November of that year, the Gardners not only openly declared themselves to be copartners, but as such acted and contracted, and obtained credit both for work and materials in their joint business of housewrights. In the month of December of that year they bought the lot of land upon which their planing-mill, etc., was subsequently built at auction sale, of the town of East Greenwich; the respondent Champlin bidding off the same in the name of William A. Gardner—the deed of the lot being given by the town treasurer of the town, at the request of William A., to his brother Benjamin W., and himself, as tenants in common, in fee—and William A. Gardner paying to the town treasurer, as the letter swears, the consideration (four hundred and ten dollars) of the deed. According to the same witness, the two Gardners immediately built a shop upon the lot purchased by them, in which they worked together; and in the spring of 1852 built upon it the planing-mill, etc., in question. It appears, too, from the testimony of the witnesses Wall and Salisbury, that the brick and lumber, with the exception of some beams obtained from Providence, were purchased in the name and on the credit of the company from the firm of Pearce, Salisbury & Co., as well as that the machinery for the first mill was purchased in Albany

by that firm for the firm of Gardner & Brother, charged to the latter firm, and paid for, in whole or part, by them. It is also proved that the two Gardners worked together on the buildings in question, contracted for other work and materials for the same in the name of their firm, and that from the time of their completion up to the time of the death of William A. Gardner the works placed upon the lot were operated and used exclusively in the copartnership business. It appears, too, that when obtaining credit, and for the purpose of obtaining credit for the main materials, brick and lumber, out of which the works in question were built, they stated, upon inquiry, their means as copartners to the furnishers, and that the materials were obtained upon the joint means and the credit of both. It does not distinctly appear, since no company books have been produced, that the consideration money for the lot (four hundred and ten dollars) was carried into the copartnership accounts; but it does appear that it was in fact paid to the town treasurer of East Greenwich by William A. Gardner, the deceased partner, and not by Benjamin W., the surviving partner; and in such a state of the proof, it is, at least, not disadvantageous to the latter to infer that it was a part of the one thousand five hundred dollars contributed by the former to balance the money brought from California by the latter, from which the three thousand dollars was made up, which, according to their declarations, was to constitute the capital of the concern to start them in their copartnership undertakings. There being nothing, in our view, of any weight produced on the other side to check this strong and uniform current of the testimony, it not being made to appear, in contradiction or in addition, as it might be if such were the fact, that any portion of the cost of this lot or of these buildings and machinery was paid by Benjamin W. Gardner, or even by William A. Gardner, out of their separate means, the conclusion of fact, to our minds, is irresistible, that this lot was bought and these works erected by the firm of Gardner & Brother, out of the capital or upon the credit of the firm, exclusively for the use of the firm, and were during the whole time of its existence, that is up to the death of William A. Gardner, used exclusively in the business of the firm; and hence in a court of equity that this property, notwithstanding the form of the deed, is to be viewed and treated as the copartnership property of the firm of Gardner & Brother.

The counsel for the respondent is mistaken in supposing, under such a state of facts as this, that the fact that the deed of

this lot runs to the individual members of the firm of Gardner & Brother, as tenants in common, without describing them as copartners, raises a presumption, in the view of the court of equity, that the property thus bought and used is intended to be kept as the separate property of the respective partners, which stands until some express and even written proof is given to show the contrary intention. A court of equity does not ordinarily, in relation to such a subject, base its presumptions upon mere forms, but rather upon facts which lead to the substantial truth and justice of the case. The well-settled presumption in equity is precisely the other way. As said by Chancellor Walworth in *Buchan v. Sumner*, 2 Barb. Ch. 198, 199 [47 Am. Dec. 305]: "Where real estate is purchased with partnership funds for the use of the firm, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, I believe it has never been doubted in England that such real estate was in equity to be considered and treated as the property of the members of the firm collectively; and as liable to all the equitable rights of the partners as between themselves. And for this purpose the holders of the legal title are considered in equity as the mere trustees of those who are beneficially interested in the fund; not only during the existence of the copartnership, but also upon the dissolution thereof by the death of some of the copartners or otherwise." And see the cases cited by him and to same effect, *Hozie v. Carr*, 1 Sumn. 181, *per* Story, J. In this last case Mr. Justice Story says: "But the circumstance that the payment has been made out of the partnership funds, especially if the property purchased be necessary to the operations of the partnership business, and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property; and in the absence of all countervailing circumstances, it will be absolutely decisive." "In whosoever hands the legal title may be placed, whether in one or all of the copartners, and whether the deed describes them as copartners or as tenants in common, if the property be purchased with the funds and for the use of the firm, the decisive presumption, in the absence of proof to the contrary, is that it was intended to be held as partnership property:" *Hunt v. Benson*, 2 Humph. 459; *Buchan v. Sumner*, 2 Barb. Ch. 205 [47 Am. Dec. 305]; *Smith v. Tarlton*, Id. 336, 338; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Dyer v. Clark*, 5 Met. 578, 581 [39 Am. Dec. 697]; S. C., 1 Am. Lead. Cas. 488, and cases cited in note; *Howard v. Priest*,

5 Met. 585; *Burnside v. Merrick*, 4 Id. 541; Collyer on Part., sec. 154, where see the result of all the authorities stated.

The line of cases cited and relied on by the counsel for the respondent upon this subject will be found to refer to the question whether real estate of a copartnership, upon the death of one of the copartners, and after the debts have been paid and the equities adjusted between the several members of the firm, belongs, in equity, to the executor or administrator of the decedent as a part of his personal property; or whether the beneficial interest, as well as the legal title, in the decedent's share of such real estate descends to his heirs at law. Upon this question of equitable conversion of real into personal estate, as between the heir and personal representative of a deceased partner, Lord Eldon overruled the latest decision of Lord Thurlow, and the decision of Sir William Grant, and held, in *Devaynes v. Devaynes*, Montague on Part. App. 97, in favor of the conversion, and consequently in favor of the title of the executor or administrator to such surplus. His ruling upon this point seems to have been generally followed by the later chancery judges in England; although two or three recent cases, in which the circumstances were special, have been decided in favor of the heir. The American cases, on the other hand, generally adopt the conclusion that the deceased partner's share of the surplus of the real estate of the copartnership which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is, as between the heirs at law and personal representative of the deceased partner, to be considered and treated as real estate: *Dyer v. Clark*, 5 Met. 578, 579 [39 Am. Dec. 697]; S. C., 1 Am. Lead. Cas., Hare & Wallace's Notes, 491, 492, and cases cited; *Howard v. Priest*, 5 Met. 585, 586; *Burnside v. Merrick*, 4 Id. 541, 544. The whole subject is, however, so luminously treated by Chancellor Walworth, in *Buchan v. Sumner*, 2 Barb. Ch. 198 [47 Am. Dec. 305], and onwards, with a full discussion of the cases, English and American, up to the time of his judgment, 1847, that nothing need be added; and indeed, the question of what shall become of any surplus of such property, after the equitable trust under which it is held is satisfied out of it, is so foreign to the case before us that we should not have mentioned it except in answer to the cases with regard to it, cited and relied upon by the counsel for the respondent.

It was noticed, too, by the counsel for the respondent, that in *Dyer v. Clark*, *Howard v. Priest*, *supra*, and *Hoxie v. Carr*,

1 Sumn. 181, the respective deeds under which the partners in those cases held the real estates there in question described them as copartners, as if that were the ground of decision in either of those cases. That the deed did describe the grantees as copartners is true of the case of *Dyer v. Clark*, *supra*; but it is true only of one of the two parcels of land in question in *Priest v. Howard*, 5 Met. 583, which were conveyed by separate deeds; the land and store in Moon street, Boston, being conveyed to the two partners as tenants in common, and not describing them as copartners. In *Burnside v. Merrick*, 4 Id. 537, decided at the same time, the deed does not seem to have described the grantees as copartners, as is shown by the mode in which the court state the question on page 541. It is evident, therefore, that the absence of such a description in the deeds was not deemed controlling in either of those decisions. In *Hoxie v. Carr*, *supra*, Judge Story notices that one of the deeds from a former proprietor to the copartners, Reynolds & Hoxie, of his interest in the thirty-seven acres of land thereby conveyed, bounds it on one side on a three-acre lot, stated to belong to the West Greenwich Manufacturing Company, and which formed part of the premises in dispute, and that the deed from Reynolds to Carr spoke of the whole as formerly belonging to the same company. No doubt a chancellor would seize hold of such a feature in a case before him, for the purpose of strengthening the presumption raised by the substantial fact that the estate was purchased with the copartnership funds, for the copartnership use; but we have already seen that Judge Story put the latter as the main ground of presumption, and not the former fact; liable to be rebutted, of course, by any controlling agreement or act of the copartners. This feature, deemed so controlling, exists in very few of the American cases, and in none of the English cases that we recollect. In *Delmonico v. Guillaume*, 2 Sandf. Ch. 366, the deed of the farm adjudged by the chancellor to be copartnership property, was originally executed to John Delmonico, who subsequently executed to Peter Delmonico a deed conveying to him an undivided half. But without taking more time in commenting on particular cases, all of which have of course their peculiar features more or less marked, and more or less controlling the judgment of the courts before which they were heard, it is clear from them that the trust in favor of the firm is held to result from the fact that the consideration was paid by it, as in other cases of resulting trusts; and the implication of this trust is held

to be confirmed by the fact that the property was bought for the use of the firm and actually used in its business, when no agreement, or conduct implying such an agreement, prior or subsequent to or at the time of the purchase, is proved, to indicate an intention on the part of the copartners to hold the real estate thus purchased by them in undivided shares as their separate property.

The other question involved in this cause, that is, whether the title to the property in question acquired by the respondent Champlin is, under the circumstances, held by him subject to or exonerated from the trust with which it was clothed in the hands of his grantee, remains to be considered.

Beyond doubt, a *bona fide* purchaser or mortgagee of partnership lands, who obtains the legal title from the person in whom it is vested, without notice of the equitable rights of others in the property as a part of the funds of the copartnership, is entitled to protection in courts of equity as well as in courts of law: *Per* Walworth, chancellor, *Buchan v. Sumner*, 2 Barb. Ch. 198 [48 Am. Dec. 305]. To this extent, and no further, go the decisions in the cases of *McDermot v. Lawrence*, 7 Serg. & R. 438 [10 Am. Dec. 468]; *Forde v. Herron*, 4 Munf. 316; *Hale v. Henrie*, 2 Watts, 143 [37 Am. Dec. 289]; *Ridgway's Appeal*, 15 Pa. St. 177 [53 Am. Dec. 586]; and the remark of the court in *Sigourney v. Mann*, 7 Conn. 11, relied upon by the counsel for the respondent. Holding as we do, that this real estate was copartnership property, the legal title to the undivided half was held by the surviving partner, according to every authority on this subject, English and American, cited on either side, in trust for the payment of the debts of the firm, and of any balance that might be due to the estate of the deceased copartner upon the settlement of the partnership accounts. For the purpose of executing this trust, though but half of the legal title was vested in him, the surviving partner had the right in equity to sell the whole beneficial interest in the estate; and a court of equity would assist the purchaser by contract to get in the legal title to the other half from the heirs at law of the deceased copartner, even though they were infants: *Delmonico v. Guillaume*, 2 Sandf. Ch. 366-368, and cases cited; *Dyer v. Clark*, 5 Met. 576 [39 Am. Dec. 697]; S. C., 1 Am. Lead. Cas. 488; *Howard v. Priest*, 5 Met. 585; *Burnside v. Merrick*, 4 Id. 540, 541, 545; *Andrews v. Brown*, 21 Ala. 437 [56 Am. Dec. 252]; *McAlister v. Montgomery*, 3 Hayw. 94.

On the other hand, the surviving partner, though he may be

clothed with the whole legal title, has no right or power to divert the trust property to his own private uses, in derogation of the rights of the creditors of the firm, or of those entitled to the estate of his deceased copartner. If he were to attempt it, a court of equity would, upon proper application, restrain him from so doing, remove him from the trust he was violating, and appoint a receiver in his stead. If he convey the trust estate for such a purpose to any one cognizant of the trust with actual, or under such circumstances or in such form or mode as to give constructive notice of his design to violate it, the person taking the conveyance, though a purchaser for full value, takes it subject to the same trust, though the consequence may be to deprive him of the whole benefit of his purchase. It is only the *bona fide* purchaser for value who, as in the cases already cited, purchases it in ignorance that it is copartnership or trust property, or, as in cases that might be supposed, knowing that it was copartnership property, takes the title in such form and under such circumstances as to indicate to him that it is sold and conveyed for the purpose of applying the proceeds to the proper uses of the trust, that can hold the title exonerated from the trust. Such a purchaser does not stand in equity merely upon the derivative title of his grantor. Invested with the legal title, he securely rests upon his own equities as an honest purchaser, without notice and for value—always protected, always a favorite, so to speak, in a court of equity. We agree with the counsel for the respondent, that it will not do to say, as taking the language of the courts away from the connection in which it is used in some of the cases that have been cited, and especially in the case of *Horie v. Carr*, 1 Sumn. 181, it has been said before us, that, under all circumstances, he who purchases the real estate of a copartnership from the surviving partner, knowing it to be such, and knowing that there are copartnership debts, will take the estate subject to those debts. Much less is it true, as it has been contended, that such an estate can be administered, and a title to it given, only through the intervention of a court of equity. Such a partner, certainly, and each partner of a dissolved firm, unless deprived of it by contract, has in equity precisely the same power to deal with the copartnership property as during the continuance of the copartnership, though liable in proper cases to be deprived of that power by the appointment of a receiver: *Per* Turner, lord justice, *Butchart v. Dresser*, 31 Eng. L. & Eq. 121.

If the legal title in copartnership lands be in him, he may dis-

pose of and convey the whole beneficial interest in those lands for the purpose of realizing the proceeds of sale, and of applying them to the payment of the debts of the firm, and of the final balance that may be due to him as copartner; and a court of equity will not interfere, most surely, with this exercise, which duty imposes, or his said claims justify, of his *jus disponendi*. So far from it, it will, as we have seen, if the legal title be in part only vested in him, or be wholly vested in another, assist him in the exercise of his right, by compelling the conveyance of the legal title to himself, or to a purchaser from him, when such a conveyance is needed to enable him to perform his duty to others, or to satisfy even the demands that he may have as copartner upon such property of the firm. In such cases, the purchaser, though he know that he has purchased copartnership property, and that there are copartnership debts to be paid out of it, yet if he honestly buy the property of and pay for it to the surviving partner with no knowledge of, and under circumstances from which a court of equity implies no notice of, an intended misapplication by the partner of the proceeds of sale, will not be liable on account of any fraud, default, or miscarriage of the surviving partner with regard to them. It is a strict logical sequence that the right to dispose of such property on the part of the surviving partner implies and requires the right to buy it on the part of an honest and careful purchaser; nor is this, as has been contended before us, one of that class of trusts in which, notwithstanding the power of sale on the part of the trustee or surviving partner, the purchaser, knowing that he is purchasing trust property, is bound to see to the application of the purchase money; or, in this case, to see that it is applied to the payment of the copartnership debts. We grant that such a notion is inferable from the language used by Mr. Justice Story in *Hoxie v. Carr*, 1 Sumn. 192, if it be proper to disconnect his language from the case before him, or to suppose that he intended accurately to state all the conditions of the case in which, under all circumstances, a purchaser of the real estate of a partnership from a copartner of a dissolved firm would take the estate subject to the burden of the trust. But such an inference would do great injustice to that learned judge, who to great acquisitions added a keen sense of justice. He was speaking in relation to the case before him, which we shall have occasion hereafter to compare with and apply to this.

A surviving partner, in the sense in which he is a trustee of the real estate of the copartnership, is certainly a trustee with

as clear a power to give receipts for the purchase money, upon sale, as to give receipts to the debtors of the firm, upon payment to him of the copartnership debts. This results from his power and duty, so far as necessary, to convert the partnership property into money, and therewith to pay the copartnership debts, and to settle the final balance, if any, which may be due, upon settlement of the copartnership accounts, to the representative of his deceased copartner.

It was never dreamed, in a court of chancery, that this fell within that class of trusts in which, tested by the well-known distinctions of the leading case of *Elliot v. Merryman*, 3 Barn. 78, the purchaser was bound to see to the application of the purchase money, provided he knew that he was purchasing a portion of the trust estate. Thus to limit his power of sale would be to load the settlement of the copartnership estate with an intolerable burden—lessen it at once to one half its value as a subject of sale—and, as contended by the counsel for the complainant, necessarily draw the settlement of every such estate into a court of chancery, to be administered and sold under its orders, for the protection of purchasers and the consequent realization of the value of the property of the firm. How foreign all this would be to the course of chancery with regard to such a trust may be seen by the examination of the case above cited, and the admirably arranged collection of authorities, American as well as English, which, allowing for the difference of circumstances, have, in the main, followed it for upwards of a hundred years, found in 1 *White & Tudor's Lead. Cas. Eq.*, with *Hare & Wallace's Notes*, 40–60, side, 1852. The only danger to a purchaser of the trust estate from a trustee of the class in which a surviving partner is to be ranked can arise from his becoming a party to a breach of trust on the part of the trustee, or from his making his purchase under such circumstances as to visit him with constructive notice that a breach of trust, as to the purchase money, is designed: *Eland v. Eland*, 4 Myl. & Cr. 420, 18 Eng. Cond. Ch. 427; *Hill v. Simpson*, 7 Ves. 152; *Champlin v. Haight*, 10 Paige, 275; and see *Rogers v. Skillincorne*, 1 Ambl. 188; *Walker v. Smalwood*, 2 Id. 676; *Lloyd v. Baldwin*, 1 Ves. sen. 173; *Watkins v. Cheek*, 2 Sim. & Stu. 199; S. C., 1 Eng. Ch. 199.

That a gross fraud has been perpetrated by the surviving partner in this case by the sale of the undivided half of this real estate of the firm of Gardner & Brother, and absconding with the proceeds, is admitted on all hands; and the question which

we are to decide is, whether the consequences of this fraud are to fall upon the creditors of the firm and the estate of the deceased copartner, or upon the respondent Champlin, who, as he alleges and proves, paid full value for his purchase. In the view in which the state of the proof compels us to regard this case, it will be a hard case whichever way we decide it; and the question simply is, whether, under the circumstances of his purchase, the respondent Champlin, having obtained the legal title to an undivided half of the real estate of the firm in question, has an equal equity with the creditors and the estate of the deceased copartners to the beneficial interest of the moiety purchased by him. If he has, he cannot be disturbed in the full enjoyment of his purchase by us, whatever may be the consequences to them; if he has not, our course and duty will be plain before us, whatever may be the consequences to him. This question, in our judgment, depends upon the solution of two other questions, mainly questions of fact: 1. Did he know that he was purchasing the property of the firm of Gardner & Brother, needed for the payment of the debts of that firm, or to settle any balance of the copartnership accounts due to the estate of the deceased copartner? and 2. Are the circumstances under which he made his purchase, and the nature of the interest conveyed to him, such as, in the view of a court of equity, gave him notice of the breach of trust intended by Benjamin W. Gardner, from whom he took his deed?

He has sworn in his answer that he did not know that this real estate was copartnership property; but supposed that it was the separate property of the two copartners, held by them as separate property, according to the form of the deed under which they held it, as equal tenants in common. Now, this may be quite true in one sense; for he probably did not know how a court of equity regards real property held by the copartners under a deed in that form, when bought with the money and credit and held for the uses of the copartnership; and indeed, the whole manner in which this copartnership was attempted to be settled, both by Benjamin W. Gardner and the administrator of William A. Gardner, shows a gross ignorance of the law relating to this whole subject. But such ignorance, though it might relieve him under some circumstances from the imputation of actual fraud, cannot aid him in the view of the court of equity, when called upon to determine whether he had legal notice of a fact, or to adjudge the legal effect of his acts. If, knowing the facts, that this property was bought with

the partnership funds for partnership use, and was exclusively used by the partnership during the whole term of its continuance, he took upon himself to determine, from the form of the deed under which it was held by the copartners, that it was not copartnership property, he took upon himself, in a matter of law, to be wiser than the law; and if mistaken, has no one to blame for his presumption but himself. The aid of the able counselor who has argued his case, invoked before he made his purchase, might have been even more helpful to him in this particular than circumstances have allowed it to be.

Now, for us to doubt that the respondent Champlin knew these facts which appear, from the proof, to have been notorious in the village of East Greenwich, and which the partners themselves, by their daily acts and repeated declarations, took pains, for the sake of obtaining credit for their firm, to make so, would suppose on our part a degree of skepticism quite unfitting us for an office which requires us, in matters of proof, to weigh and decide upon probabilities. Although, during a portion of the time at least of the continuance of this copartnership, the respondent owned and occupied a farm a few miles off, in West Greenwich, yet the occasions of his business and pleasure, as proved, brought him frequently to the village of East Greenwich, where the firm did business, and where the works in question were situated, and where, also, the respondent's mother and family resided. His personal and business relations with both the members of this firm were intimate. His sister was the wife of William A. Gardner, and Benjamin W. Gardner boarded with his mother, and was thought to be attentive to an unmarried sister, and he was frequently with both the copartners, and was advised with about their business. He bid off for William A. Gardner, at auction, the very lot upon which these works were situated when sold by the town of East Greenwich, and must have known the openly declared purpose for which it was bought. From the proof, no one could have been more cognizant of the credit and capital upon which the firm did business, and out of which they built up the property in question. This intimacy continued with Benjamin W. Gardner after the decease of William A. His brother, Robert H. Champlin, was the original administrator appointed on the estate of William A. Gardner, and he himself took, apparently, a great interest in the affairs of the estate, frequently attending the courts of probate when questions concerning it were there agitated, and seeming to be a prominent actor in its affairs. He knew, or affected to know,

the precise condition of the estate of his deceased brother-in-law, and informed the witness David W. Hunt, a creditor of the firm to the amount of four hundred dollars, only some six weeks after the death of William A. Gardner, that he would get his whole debt; that the debts of the estate were about three thousand dollars, and that there would be property enough to pay them all, though he declined the offer of the witness to guarantee the payment of his debt for a commission of five per cent. In his answer he admits that both at the decease of William A. Gardner and at the time of the taking of his deed he knew that the firm owed debts, though not the amount; and although he denies that he knew that the firm was insolvent, yet it is evident from the fact, and his means of knowledge concerning it, that he must have known that it was grossly so, and that nothing was done by the surviving partner, who still continued to use the property of the firm, to pay any of its debts. A purchase made of a surviving partner thus situated and thus conducting, to the knowledge of the purchaser, would be required by a court of chancery to be made under circumstances of openness, publicity, and consultation with all interested in the estate, and in a mode quite free from suspicion in all respects, before the purchaser could afford to stand before it upon as high a ground of equity as the creditors of the firm or the representatives of the estate of the deceased copartner.

But what were the circumstances of this purchase, and the mode in which it was effected? Without communication, so far as the evidence shows, with the representative or heirs of the deceased copartner, in the latter of whom the legal title to the other undivided moiety of this estate was vested, and in the disposition of which the former was interested in relief of the estate of his decedent, he is found with Benjamin W. Gardner one evening, as late as nine o'clock, rousing up a justice of the peace to take the latter's acknowledgment of the deed in question, ostentatiously hands over to the justice one thousand two hundred dollars in the first place to count, as the consideration of the deed, and then hands over that, with fifty dollars more, to make the precise amount, to Benjamin W. Gardner, who delivers to him the deed. After this they are seen together in conversation coming from the house as late as ten o'clock; and this is the last that we hear of this consideration money or of the surviving partner, Benjamin W. Gardner, who that same night, or early the next morning, absconded with the whole of it, and probably much more, and has never been heard of by the creditors of the firm since.

Now, grant that, considering the denial of the answer, there is here no such proof of community of corrupt design and action between the seller and the purchaser, so pointedly charged in the bill, as will justify us in holding that the charge is proved; yet there are circumstances creating grave suspicion, which cannot be overlooked in a court called upon to weigh and balance the equities of such a purchaser with the undoubted equitable rights of the creditors of the firm. If this secrecy and cover of night in this transaction were sought at the suggestion of the seller, they should have excited the suspicion of the purchaser; if sought by the latter, considering the other facts attending the execution of the deed, they go somewhat further, and certainly do not aid the case of the respondent.

But further, and most especially, it is to be considered that this was an insolvent firm, with a large amount of debts outstanding, whose existence was known to the respondent, and none of which he knew had been paid by the copartner whose duty it was to pay them, and with whom he was dealing. He was taking from this partner a conveyance of a portion of what he knew, or should have known, as a matter of law, was the property of the firm; and certainly knew, as a matter of common honesty, should be applied to the payment of its debts. This mill property should have been sold together as a whole, if the purpose had been to realize the most from it for the benefit of the creditors; and no one could have known this better than a sharp, active man of business, such as the respondent is proved to be. To sell it in undivided shares was to sacrifice a large portion of its value; for no one would buy the other half except the respondent, and he could get it almost at his own price; and the proof is, as might have been foretold, and should have been foreseen, that as the consequence of this transaction, neither half of this property is worth the nominal amount of the consideration paid by the respondent for the moiety thus purchased by him.

We do not say that under no circumstances can the sale by a surviving partner of an undivided moiety of the real estate of a firm, the legal title of which is to that extent vested in him, be upheld in a court of equity. Such a sale may be made with such consent of all parties interested in it, with such publicity, and may even be so advantageous in some conceivable cases, as a mode of sale, as to be approved and even directed by a court of equity. But when, as in this case, a surviving partner, in whom one half of the legal title of the real estate of the firm happens

to be vested, affects privately to convey, to one who knows that it is partnership property, precisely that undivided half, treating it as if it were beneficially his own, he thereby gives presage of an intent to convert the proceeds to his own use, instead of applying them to the uses of the firm whose property it is. The purchaser must know, if the property be copartnership property, that the state of the legal title cannot represent in whom the beneficial interest in it is really vested; and in what proportion, if in any proportion, in him from whom he is taking the title. The very fact that he knows that it is copartnership property, and especially, as in this case, that there were copartnership debts outstanding to a large amount, gives him notice that others are interested in the estate than him with whom he is dealing, with whom he should in all fairness communicate, as entitled to know what disposition is about to be made of their own. But if he will privately and secretly contract with and pay his money to a surviving partner for his legal title, who by the form of the transaction is treating the matter as if he deemed the property as his own, and meant to appropriate the proceeds of sale as his own to his own use, it is doing him no more than justice for a court of chancery to inform him that he shall have precisely what in such a mode of purchase, and under such circumstances, he had a right to expect—the legal title only; the beneficial interest to go to those to whom in equity it belongs. Though warned by the surroundings of the transaction, he chooses to rely solely upon the good faith and honesty in his trust of the mere owner of the legal title, who may not, as he should know, have a *scintilla* of interest in the beneficial estate, and must abide by the result of his misplaced confidence, if such it turn out to be. If added to all this there be, as here, circumstances of suspicion hanging about the execution of the deed, looking at the time and mode of conducting it, and the sudden absconding at the close of the transaction of the surviving partner with the proceeds of sale, we cannot estimate the equities of the purchaser at so high a value as to allow them to counterbalance the clear and undoubted rights of the creditors of the firm in whose aid our jurisdiction is invoked by the equitable representative of the rights of the deceased copartner.

In *Hoxie v. Carr*, 1 Sumn. 193, the fact that the deed was executed by one copartner only was alluded to by the learned judge who tried the cause, as showing “that the purchasers should and ought to have known that without a joint convey-

ance or release from all the partners no absolute conveyance could be acquired by their grantee, Reynolds. They were put upon inquiry to ascertain whether any such conveyance or release had been made; and they cannot now set up their ignorance of law to excuse their want of diligence;" and he then goes on to show that if the purchasers in that case had made inquiries, they would have ascertained the very facts which the evidence convinces us that this respondent knew. Indeed, the learned and accurate commentators upon this and the class of cases to which it belongs—Messrs. Hare & Wallace—say that "it is a consequence of the principle of land being affected with a trust as copartnership property, that when one partner disposes of his separate interest in land held as copartnership stock, to a purchaser having notice, he sells only his residuary interest, after the partnership debts and the share of the other partner are paid:" 1 Am. Lead. Cas., Hare & Wallace's Notes, 492. Such was evidently the idea of Mr. Justice Story, as expressed in his decision in the case of *Hoxie v. Carr*, 1 Sumn. 181; and such was the opinion expressed by the supreme court of Massachusetts in *Dyer v. Clark*, 5 Met. 580 [39 Am. Dec. 697]. "But if," says the learned chief justice of that court, in delivering its judgment in the latter case, "a person knows that a particular real estate is the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals." It is true, as suggested by the counsel for the respondent, that in case of a dissolution by death of a firm consisting of but two copartners, the sole power to dispose of the copartnership property and apply it to the payment of debts and to close the copartnership accounts, survives to the surviving partner; and thus, that he is the only person, as long as he is suffered to exercise the trust, to act in its administration. But the surviving partner is but a trustee; and if he, from his secret and suspicious mode of dealing with the trust property, treating it by the very mode of his conveying it as if it were his own, and regardless of the interests of the creditors of the firm as to the residue, sells to a purchaser an undivided share of it, because the legal title to that share happens to be vested in himself, we deem that he thus apprises the purchaser of his design; and that, under such circumstances, his absconding with the proceeds of sale should be regarded as little more than the fulfillment of a reasonable expectation on the part of the purchaser.

Had this case been presented to us in a form in which we could have applied these reasons, the result, upon the proof now before us, would have been different; but as it is, this bill, upon the ground before stated, must be dismissed with costs.

PARTNERSHIP RECEIVERS: See *Pirtle v. Penn*, 28 Am. Dec. 70; *Allen v. Hawley*, 63 Id. 198; *Adams v. Haskell*, 63 Id. 491.

PARTNERSHIP AND SEPARATE CREDITORS, LIENS OR PRIORITIES OF, as to joint and separate property of the partners: See *Deal v. Bogue*, 57 Am. Dec. 702; *Baker's Appeal*, 59 Id. 752; and *Cummings's Appeal*, 64 Id. 695, and cases cited in the notes thereto.

PARTNERSHIP REALTY, HOW REGARDED, and rights of partners in: See *Buchan v. Sumner*, 47 Am. Dec. 305; *Ridgway's Appeal*, 53 Id. 586; *Andrews's Heirs v. Brown*, 56 Id. 252; *Lang's Heirs v. Waring*, 60 Id. 533; *Ruffner v. McConnel*, 63 Id. 362; *Cummings's Appeal*, 64 Id. 695, and notes. The principal case, together with *Buchan v. Sumner*, *supra*, is cited and approved in *Shearer v. Shearer*, 98 Mass. 117, to the point that realty of a partnership is, in this country, regarded as converted into personalty only so far as necessary for the payment of the partnership debts and the adjustment of the mutual equities of the partners. In *Hiscock v. Jaycox*, 12 Nat. Bank. Reg. 517, it is held, citing the principal case and *Buchan v. Sumner*, *supra*, that as partnership realty is regarded as impressed with the character of personalty in equity, the *onus* is on the party who alleges that it has lost that character to show, not only that the creditors of the partners have been paid, but that as between themselves the accounts of the partners have been settled. Until this has been done, the land remains partnership assets.

EDDY v. CAPRON.

[4 RHODE ISLAND, 394.]

CONTRACTS BASED ON SALE OF OR TRAFFIC IN OFFICES of any description are void, as against public policy.

DRAFT DRAWN IN CONSIDERATION OF RESIGNATION OF OFFICE of physician to a United States marine hospital, in the drawer's favor, is void, although there was no promise to recommend the drawer's appointment, and although the resigning officer had already resolved to remove to another state, and merely wished to get back money previously paid by him to the drawer for resigning the same office in his favor.

ASSUMPSIT against the drawer of a certain draft which the drawee refused to accept. Verdict for the plaintiff, and motion for a new trial for misdirection. The case is stated in the opinion.

Munchester, for the defendant,

Eddy, for the plaintiff.

By Court, AMES, C. J. This is a motion for a new trial, alleging several distinct grounds, all of which, however, were waived at the hearing, with the exception of one, founded upon a direction given by me to the jury at the trial of the cause. It appeared that the order sued on was one of three, for one hundred dollars each, drawn by the defendant, then physician of the marine hospital of the port of Providence, upon Gideon Bradford, collector of that port, requesting said Bradford to pay to the plaintiff, on the last of December, 1854, the sum of one hundred dollars from the moneys which should then be due to the defendant for medical services rendered to the marine hospital, which the collector, however, refused to accept. The consideration of the three orders was proved to have been the resignation by Dr. Edward V. Hathaway of the said office of port physician, in favor of the defendant, so that he might receive the appointment; and it was further proved that in consequence of the above arrangement Dr. Hathaway did resign the office, that the defendant subsequently was appointed to it, and thereupon drew the three orders above, the last of which, the others having been paid, was the subject of the suit. There was no evidence of any promise by Dr. Hathaway to recommend the defendant as his successor, or to exert any influence to procure his appointment as such, or that he had done or was expected to do either. It was proved, on the other hand, that some few months previous Hathaway had paid to the defendant the sum of five hundred dollars for resigning the same office and recommending him as a suitable candidate for it, in consequence of which resignation and recommendation Hathaway had received the appointment; but subsequently, resolving to remove to California, made the above arrangement with the defendant as a fair mode of getting back a portion of the consideration paid by him to the defendant for the defendant's resignation of the office, and for procuring his appointment to it. For the purposes of the trial, and requesting the counsel for the defendant to save the point and bring it before the full court for decision, I ruled that the consideration proved was a lawful and sufficient consideration to support the contract to pay; and it appearing that the plaintiff—a friend of Dr. Hathaway—had advanced the amount of the order, and received it from Hathaway and the defendant, as the representative of his advance, I directed the jury, upon these facts, if by them found, to return, as they have done, a verdict for the plaintiff.

At the trial, no question was made of the plaintiff's knowledge

of the nature of the transaction upon the faith of which he advanced his money, and no proof was offered as to it; the ruling rendering it unnecessary.

We are all satisfied that the direction given to the jury was wrong, and that a new trial in this case must be granted. It is true that the numerous cases upon this subject found in the English reports turn, in general, upon the statute 5 & 6 Edw. VI., c. 16, secs. 2, 3, avoiding all agreements for the sale or deputation of certain offices, concerning, in the main, the administration of justice and of the king's revenue, and the keeping of his places of strength, and upon the 49 Geo. III., c. 126, extending the provisions of the statute of Edward, with certain specified exceptions, to all offices in the gift of the crown; to all commissions, civil, naval, and military; to all offices and deputations to office in the departments, or under the appointment or control of the high officers of state, and other officers, civil and military, named in the statute, as well as in the control of any other public department or office of government, in any part of the united kingdom, or any of his majesty's dominions; and lastly, to all offices, commissions, places, and employments belonging to or under the appointment or control of the East India Company. It is also true that we have no similar statute in this state; yet we have no doubt but that all contracts based upon the sale of or traffic in offices of any description, at this day and in this country, are void at common law, as against public policy.

By the theory of our government, all offices, whether civil or military, whether general or, as in this case, professional, are trusts held solely for the public good, and in which no man can have a property to sell, or can acquire one by purchase. Appointments to them are presumed to be made solely upon the principle of *detur digniori*; and the office is to be borne by the appointee for the public good, as long as his services are required in it; and any practice whereby the base consideration of money is brought to bear in any form upon such appointment to or resignation of office conflicts with and degrades this great principle and policy. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted by law to the precise point of adequate remuneration for them. Any premium paid to obtain office, other than that which the law establishes or regulates, interferes with this adjustment, and tempts to speculation, overcharges, and frauds in the effort to restore the balance thus disturbed. In short, without dwelling

longer upon so obvious a policy as that involved in such transactions, the moral sense of every person educated in a free country anticipates all reasonings upon such a subject, and, as it were, instinctively condemns all agreements impugning this policy, as at war with the whole theory of our government. At the trial I felt this; but recollecting that I sat to administer an established system, and not merely to follow out my own notions of policy, and knowing that the decisions upon this subject had turned principally upon statutes, and not remembering that any had gone quite so far as to avoid a contract stipulating for a bare resignation, ordinarily deemed the exercise of a right of the officer, and which involved no further expense—in the way of a retiring allowance—to the public, nor required nor implied any recommendation or influence to be used for the sake of reward in procuring an appointment to be made to the vacancy thus created, I felt bound to rule as I did, until an opportunity could be given to consider the authorities, in view of what seemed to me to be the special equities of the case. That opportunity has now been had, and we have examined nearly all the cases, from *Ellis v. Ruddie*, 2 Lev. 151, to *Graeme v. Wroughton*, 32 Eng. L. & Eq. 561, decided last year by the court of exchequer in England; besides the cases at law in New Hampshire: *Meredith v. Ladd*, 2 N. H. 547; *Carleton v. Whitcher*, 5 Id. 196, 200; and Kentucky: *Outon v. Rodes*, 3 A. K. Marsh. 433 [13 Am. Dec. 193]; and the cases at law and in equity in New York: *Tappan v. Brown*, 9 Wend. 175; *Gray v. Hook*, 4 N. Y. 449; *Becker v. Ten Eyck*, 6 Paige, 68.

We do not find any case which comes up quite to the case at bar. In *Harrington v. Du Chatel*, 1 Bro. C. C. 124, Lord Thurlow, after hearing, perpetually enjoined a suit upon an annuity bond, granted by the plaintiff's testator to the defendant's testator, who had been the traveling tutor of Lord Rochford, then the king's groom of the stole, it appearing that the bond in question had been, with another for the benefit of another person, stipulated for by his lordship as the price of a recommendation to the office of one of the pages of the presence, the recommendation to vacancies in which fell to his lordship in virtue of his groomship of the stole. Lord Thurlow doubted, at first, whether he should give relief, on the notion that the ground of relief constituted a good defense at law, but concluded to interpose, because a court of law at that time had never determined it to be a defense to a bond. He admitted that the office in question was not within the purview of the statute of

Edward, but treated the traffic concerning it as against the public policy of the law, "and similar to marriage-brocage bonds, where, though the parties are private persons, the practice is publically detrimental." This decision of Lord Thurlow's, and upon the principle of public policy laid down by him, was approved by Mr. Justice Coltman in the case of *Hopkins v. Prescott*, 4 Man. G. & S. 578, S. C., 56 Eng. Com. L. 578, 596, the learned judge declaring that if the contract in question "were not made void by the statute in question, 5 & 6 Edw. I., c. 16, I still think it would be void at common law." Still more recently, in the case of *Graeme v. Wroughton*, 32 Eng. L. & Eq. 569, Lord Thurlow's decision and Mr. Justice Coltman's remark were quoted, as if approved, by Chief Barron Pollock, in delivering his opinion in that case, which was a suit at law upon a bond given in consideration of the resignation of a majority in a regiment in the East India Company's service, and was deemed to fall within the purview of the 49 Geo. III., c. 126. The cases from New Hampshire and Kentucky, before cited, there being no statute forbidding the sale of offices in either of those states, were decided solely upon grounds of public policy; and the like doctrine was acted upon in New York, in a case not deemed to fall within the statute of that state in relation to this subject: *Gray v. Hook*, 4 N. Y. 449.

These were either cases, however, of the direct sale of offices, or in which, in addition to the agreement to resign, there was a stipulation, for lucre, to recommend a successor; or where the resignation procured in this way, brought upon the government or upon the East India Company, sooner than otherwise, the payment of a retiring allowance. This latter feature is found, too, in the leading case of *Parsons v. Thompson*, 1 H. Black. 322, which was a suit brought by a late master-joiner of the dock-yard at Chatham against his successor in regular order, previously foreman of the joiners, on an agreement in consideration of the retiring of the former as superannuated, to allow him, during life, extra pay from the dock-yard books, in addition to his superannuation money. The case is valuable, however, because it does not seem to have turned upon any statute, but to have been discussed and decided in reference to the public policy of the law. The reasoning of Lord Loughborough, who delivered the opinion of the court, as remarked by the counsel for the defendant, is to some extent applicable to the case at bar; for his lordship argues that if the plaintiff resigned because he was no longer fit for the place, there is no consideration for

the promise of the defendant, the case being, like this, a case of simple contract; or if he resigned at the request and upon the promise of an allowance from the plaintiff, still being fit, then the promise is void because "the public is deceived, the pension misapplied, and the service injured."

The case at bar is certainly not as strong as the case of *Parsons v. Thompson*, 1 H. Black. 322, or the case of *Graeme v. Wroughton*, 32 Eng. L. & Eq. 561; for Dr. Hathaway, by resigning under the inducement of a pecuniary offer, has imposed upon the government improperly no pension or allowance to himself—such rewards of civil service being unknown under our government. At the same time, he has either resigned because he was obliged to do so in order to fulfill his design of removing to California, in which case there would be no consideration for the defendant's promise, or he has resigned because of it, and because of the money offered to him, and so the promise is void on the ground that the government is deprived of the services of an officer it had appointed, by his being seduced from an office under it by private and unworthy motives. Whilst such a contract as this works this evil, in legal theory at least, on the one hand, it conflicts with the policy of the law in another way on the other. The defendant, the successor of Dr. Hathaway, by virtue of the contract is deprived of the fees allowed to him by the government as but a just reward for his professional skill in a most interesting department of the public service (and this order is, upon its face, an attempt to anticipate them); and besides the direct ill consequences of this, he is thus, in an office of trust, involving the purchase of medicines at the expense of the hospital fund, and the admission and discharge of sailors, home and foreign, entitled to be healed out of the hospital fund, tempted to acts of speculation, overcharge, and fraud, in order to make up the recompense which the contract takes from him. It is true that in this case there are special circumstances which give to this transaction the color of a partial restoration to Dr. Hathaway of what was wrongfully exacted of him by the defendant for procuring his appointment; and as the case now appears to us, special equities in his favor, and in favor of the plaintiff, who, for the purposes of this motion, stands in his place, which it seems hard not to allow him the benefit of. At law, at least, in such transactions the stern, unvarying rule is *portior est conditio defendentis*; and, as it seems to us, this rule equally applies, whether we connect or disconnect the two acts of traffic in which the principal par-

ties were engaged, in relation to an office under the federal government.

For these reasons, a new trial in this case is granted, the costs of this motion to abide the event of the suit.

CONTRACT FOR SALE OF OFFICE: See *Outon v. Rodes*, 13 Am. Dec. 193; *Salling v. McKinney*, 19 Id. 722; *Groton v. Waldoborough*, 28 Id. 530, and notes.

CONTRACT TO PROCURE APPOINTMENT TO OFFICE: See *Faurie v. Morin*, 6 Am. Dec. 701; *Filson v. Himes*, 47 Id. 422.

THE PRINCIPAL CASE IS CITED, as to contracts void as against public policy generally, in *Trist v. Child*, 21 Wall. 449; *Hannah v. Fife*, 27 Mich. 182.

CASES AT LAW
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

BAKER v. BRINSON.

[9 RICHARDSON'S LAW, 201.]

BURDEN IS ON COMMON CARRIER TO SHOW THAT LOSS IS WITHIN STIPULATED EXCEPTION from liability, and that there was no negligence.

EXCEPTION OF "RUST AND BREAKAGE," IN BILL OF LADING, exempts the carrier from liability for such rust and breakage only as could not have been avoided by care and diligence.

ONUS UPON CARRIER TO PROVE NO NEGLIGENCE, WHERE HE STIPULATES FOR NO LIABILITY for rust and breakage, and a stove is broken in the transit, is not discharged by merely proving that the stove was stored in a proper place, especially when another stove stored there was also broken.

ACTION against a common carrier for the value of a stove broken while being carried on shipboard. In the bill of lading, "rust and breakage" were excepted. The evidence showed that the breakage would not have occurred under careful handling, and that the injury might have been produced by the rolling of the vessel if the stove rested upon a basis not co-extensive with its own. The vessel made its usual passage of six days. The defendant showed that there was no deck load, and therefore it must be inferred that the stove was stowed in the hold, where it should have been. In his report of the case, the presiding judge says: "Upon this case my judgment is, that although the shipper and carrier may agree to stipulated exceptions from the entire scope of the carrier's common-law liability, yet, as in *Singleton v. Hilliard*, 1 Strobb. L. 203, and *Swindler v. Hilliard*, 2 Rich. L. 286, that in such cases the car-

rier must be held to 'strict proof of diligence and care in avoiding loss to the owner,' by reason of any cause within the exception; that 'the *onus* lies on the carrier to show the injury to be within the exception, and also that there was no negligence.' I do not think the carrier in this case has come up to such rules, for he has shown no more than that the stove was stowed in the hold of the vessel, or, more strictly speaking, that when the vessel arrived there was no deck load. A witness said that of two hundred stoves brought, within his knowledge, this was the second one found broken. There scarcely could have been the care and diligence exercised towards the other one hundred and ninety-eight. Decree for plaintiff for twenty dollars and twenty-five cents." The defendant appealed, and moved this court for a new trial, the principal ground being that he had shown enough in showing that there was no sign of improper stowage to cast from himself the *onus* of proving a negative.

Allemon and Northrop, for the appellant.

Martin, *contra*.

By Court, WHITNER, J. The case of *Swindler v. Hilliard*, 2 Rich. L. 286, was well considered, and fully sustains the present decision. Whilst in this state we recognize the doctrine that a carrier may limit, by special contract, his common-law liabilities, there is not the slightest disposition further to modify the rules justly applicable to such transactions. Learned judges in England and America have regretted the recognition of such exceptions. The exacting tendencies of certain great carriers of the present day, enjoying facilities that almost exclude competition, admonish us, in the application of these wholesome rules, carefully to guard against any abuses. Notwithstanding their apparent rigor, there is a salutary policy in these common-law doctrines, and those who are called to administer the law must see to it that they are not wholly evaded.

It is only necessary to bear in mind that the character of the carrier is not changed; his liability only, to the extent of the exceptions, is diminished. In all things else the very same principles apply. Care and diligence are still elements of the contract, and "strict proof" is properly required before any exemption may be claimed. There is nothing in the contract which, by implication even, can be regarded as making it otherwise. That is a sound rule which devolves the *onus* on him who best knows what the facts are. In cases of loss, proof of delivery devolves at once on the carrier the *onus* of exempting him-

self from liability—and nothing can be more reasonable—before he can take shelter under an exception to require proof of his care. In the bill of lading before us, “rust and breakage” are excepted, words of singular import, and in one sense might be supposed to cover any injury, unless the purpose was to make the owner his own insurer; however gross the negligence of the carrier, we are brought back to the same point that the exception includes such breakage as care and diligence could not avoid. However, the legal principles of our cases being scarcely challenged, unless in a very general way, the grounds of appeal seem to complain that they have been rather rigorously applied. When it is insisted that a particular fact being shown the *onus* was thereby shifted, this is but another form of asserting that a sufficient excuse was proved.

We are disposed to rest this part of the case on the view taken of the evidence by the presiding judge. The motion for a new trial is refused.

O'NEALL, WARDLAW, and WITHERS, JJ., concurred.

Motion refused.

POWER OF COMMON CARRIER TO LIMIT HIS LIABILITY BY EXPRESS CONTRACT: See *Kimball v. Rutland etc. R. R. Co.*, 62 Am. Dec. 567, and cases cited in the note 573; *Graham v. Davis*, Id. 285, note 294; *Dorr v. New Jersey Steam Nav. Co.*, Id. 125, note 129. The principal case is cited to the point that a common carrier may limit his common-law liability by contract, in *Levy v. Southern Express Co.*, 4 S. C. 241, in which it was held that this limitation might be extended to a second carrier to whom the first carrier delivered the goods, when this extension of the privileges of the contract was provided for in the contract made with the first carrier.

POWER OF COMMON CARRIER TO LIMIT HIS LIABILITY BY NOTICE.—The authorities conflict: See *Moses v. Boston & Maine R. R.*, 64 Am. Dec. 381, and note 393; *Kimball v. Rutland etc. R. R. Co.*, 62 Id. 567, note 573; *Dorr v. New Jersey Steam Nav. Co.*, Id. 125, note 129.

CONTRACT EXEMPTING CARRIER FROM LIABILITY FOR LOSS OF SPECIFIED KIND does not exempt him from liability for such loss when it is the result of negligence: *Bentley v. Bustard*, 63 Am. Dec. 561; *Graham v. Davis*, 62 Id. 285; *Camden & Amboy R. R. Co. v. Baldauf*, 55 Id. 481, and note citing prior cases 485. The principal case is cited to the point that a contract limiting a common carrier's common-law liability cannot be pleaded by him as an exemption for any loss or damage resulting from his own negligence: *Steele v. Townsend*, 37 Ala. 251; S. C., Ala. Sel. Cas. 205; *Indianapolis etc. R. R. Co. v. Cox*, 29 Ind. 362; *Ketchum v. American etc. Express Co.*, 52 Mo. 395. By entering into such a contract, the carrier does not change his character from that of a common carrier to that of an ordinary bailee; he is still liable for negligence, and he cannot, like an ordinary bailee, stipulate for exemption from responsibility for the negligence of himself or his servants: *Railroad v. Lockwood*, 17 Wall. 377, citing the principal case. But there are

cases which hold that a contract may change the common carrier's liability into that of an ordinary bailee: *Kimball v. Rutland etc. R. R. Co.*, 62 Am. Dec. 567, note 574; note to *Dorr v. New Jersey Steam Nav. Co.*, Id. 130.

BURDEN OF PROOF IS ON CARRIER TO SHOW, NOT ONLY THAT LOSS IS WITHIN TERMS OF EXCEPTION, but also that proper care and skill were exercised to prevent it: *Graham v. Davis*, 62 Am. Dec. 285, and citations in the note 294. *Contra*: See *Sager v. Portsmouth etc. R. R. Co.*, 50 Id. 659. Upon the burden of proof where a passenger is injured, see note to *Faria v. Reigle*, Id. 680-689. Proof of injury to glass by breakage, notwithstanding a contract releasing the carrier from liability for breakage of all kinds of glass, makes out a *prima facie* case of negligence against the carrier, and the onus is upon him to show the exercise of due care and vigilance on his part to prevent the injury: *Ketchum v. American etc. Express Co.*, 52 Mo. 396, citing the principal case.

STATE v. NORTH-EASTERN R. R. Co.

[9 RICHARDSON'S LAW, 247.]

MANDAMUS IS PROPER REMEDY TO COMPEL RAILROAD COMPANY TO CONSTRUCT ROAD PURSUANT TO CHARTER in crossing navigable streams so as not to obstruct navigation, though indictment lies as for a nuisance.

RULE THAT MANDAMUS WILL NOT BE GRANTED WHERE THERE IS SPECIFIC LEGAL REMEDY is restricted to cases where the legal remedy is equally convenient, complete, and beneficial.

MANDAMUS IS APPROPRIATE REMEDY TO ENFORCE PERFORMANCE OF DUTIES BY ARTIFICIAL BODIES.

MANDAMUS was granted to compel the removal of obstructions, placed in New Market and Vardell's creeks by the respondent railroad company in the construction of their road, and to proceed in crossing these streams pursuant to the provisions of their charter. The respondents contended below that the streams were not navigable, and that if it had committed a nuisance *mandamus* was not the proper remedy. The respondents appealed, relying upon the latter ground alone.

Martin, for the appellants.

Mitchell and Elliott, *contra*.

By Court, GLOVER, J. The appellants have abandoned all the grounds in support of their motion except the third, which submits that if they have committed a nuisance *mandamus* is not the proper remedy.

It is not necessary for the decision of this question to trace the writ of *mandamus* from its first institution to the present time, and to inquire how far it has been enlarged as a remedial process to advance justice and right. Its earliest application seems to have been suggested in aid of that clause of Magna

Charta which declares that *nulli negabimus aut differemus iusticiam vel rectum*: *Regina v. Heathcote*, 10 Mod. 48. There never has been any disposition to abridge the use of the writ of *mandamus* in cases where it is applicable as a remedy either by the action of the courts or by the legislature.

The general doctrine so earnestly insisted on by the appellant's counsel, that where there is a specific legal remedy the writ will not be granted, or if granted, will be quashed, is fully sustained by reason, and by the authorities to which the court has been referred. But this general rule has been restricted to cases where the legal specific remedy is equally convenient, complete, and beneficial.

The writ of *mandamus* has always been regarded as an appropriate remedy to enforce the performance of duties by artificial bodies. In the case of *Rex v. Bishop of Chester*, 1 T. R. 396, Buller, J., says: "It is peculiarly the duty of this court to see that the powers created by the king's charter are properly exercised." How far an indictment is a specific remedy, was considered in the case of *Rex v. Commissioners of Dean Inclosure*, 2 Mau. & Sel. 80. The commissioners had neglected to obey an order of the sessions directing them to set out a road as a public road, and it was held that indictment would not be a specific remedy, that is, such as the case demands, for it was a proceeding in *pœnam* for the past, and not a remedy for the future. It is admitted that if indictment be equally convenient, beneficial, and effectual, and such as the particular case demands, the court will not grant the *mandamus*: *Rex v. Severn & Wye Railway Co.*, 2 Barn. & Ald. 646. This is not the ordinary case of an obstruction placed in the highway, which may be abated as a nuisance by indictment, but the obstruction of a highway by a railway, and in the free use of both the public interest is involved. It is therefore important that in the application of a remedy public travel and transportation should not be stopped or checked, either on the highway or railway. "It ought to be the concern of a court of justice to take care that whilst they are granting a remedy to one they do not at the same time expose others to great inconveniences, and likewise that the remedy be such as may prove effectual:" *Regina v. Heathcote*, 10 Mod. 48. The relators do not require that the railway shall be destroyed, but that the corporation shall exercise the powers granted in the manner prescribed by their charter; not that they shall be punished by fine or otherwise, but that they shall do their duty to the public. This is a rea-

sonable request, and cannot be enforced by indictment without exposing the railway company to great inconvenience; and in the end, it would not prove such a remedy as the case demands. Corporate bodies must be compelled, in the performance of their duties, to discharge their public obligations.

This court is of opinion that a writ of *mandamus* is an appropriate remedy to compel the defendants, in crossing "rivers or other watercourses," to pursue the mode prescribed by their charter. The other grounds having been abandoned, the court has not considered the questions which they suggest. Since the writ of *mandamus* was granted, an act has been passed by the general assembly, and has been brought to the notice of the court, which declares "that the existing structure of said railway at the points of intersection of said road with the creeks, known as New Market and Vardell's creeks, is hereby declared to be lawful, and the said company is hereby authorized to cross said creeks without draw-bridges or other provision for the navigation of the same." This enactment necessarily supercedes the writ. It is therefore ordered that the motion be dismissed, and that all further proceedings on the writ be restrained.

O'NEALL, WARDLAW, WITHERS, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

MANDAMUS DOES NOT LIE WHERE PARTY HAS OTHER ADEQUATE MEANS OF REDRESS: *Arberry v. Beavers*, 55 Am. Dec. 791, note 806; *People v. Olds*, 58 Id. 398, and cases cited in the note 407. *Mandamus* to a municipal corporation to remove obstructions and keep open a public street will not lie where no special injury to the relators is alleged, because an indictment for nuisance is an effectual remedy: *Reading v. Commonwealth*, 51 Id. 534.

MANDAMUS IS APPROPRIATE REMEDY TO COMPEL PUBLIC FUNCTIONARIES OR TRIBUNALS to perform some duty required by law, where the party has no other remedy: *Board of Police v. Grant*, 47 Am. Dec. 102, and note 107. See also note to *State v. Dunn*, 12 Id. 30, 31; note to *Mayor v. Morgan*, 18 Id. 239; note to *Arberry v. Beavers*, 55 Id. 806.

MCBRIDE v. ELLIS.

[9 RICHARDSON'S LAW, 313.]

NOTICE OF DEATH OF LIVING PERSON PUBLISHED MALICIOUSLY, and calculated to subject the person to ridicule, is libelous and actionable.

NEW TRIAL OF ACTION FOR LIBEL WILL NOT BE GRANTED on the ground that plaintiff's counsel submitted certain writings of defendant to defendant's witnesses for the purpose of testing their accuracy in recogniz-

ing the defendant's handwriting, and afterwards, by his own witnesses, proved such writings to be authentic, when the writings themselves were not submitted to the jury either in the argument or in their deliberations.

ACTION for libel for publishing in the Charlestown Mercury, a newspaper, the following item: "Obituary. Departed this life on the second day of April, at Hickory Hill, in Prince William's parish, Mrs. Rebecca McBride, in the ninety-fifth year of her age. The editor will publish the above obituary, and oblige the subscriber. Respectfully, W. Bowers. April 4, 1853." Upon cross examination, the plaintiff's counsel exhibited to several of the defendant's witnesses five other specimens of writing, and inquired of them their opinion whether these specimens were in the handwriting of the defendant, with a view of testing their accuracy in recognizing the defendant's handwriting. Some of them recognized the handwriting in some of the specimens, and some did not. The opinions were various, and the grounds of them were given. The plaintiff then called witnesses who testified that the specimens were written by Ellis. They were not exhibited to the jury in the argument, nor were they before them in their deliberations. Verdict was for the plaintiff for thirty dollars damages. In other respects the opinion states the case. The defendant appealed, and moved the court to arrest the judgment, on the ground that the writing declared on was not a libel in law; and failing in that motion, moved for a new trial on the ground that the plaintiff's counsel was permitted to submit to the defendant's witnesses certain writings and compare them with the alleged libel, not only to test the accuracy of their opinions upon the defendant's handwriting, but to prove them to be in the defendant's handwriting.

Tillinghast, for the appellant.

Fickling, contra.

By Court, WHITNER, J. This was an action founded on an alleged libel published in a newspaper in the form of an obituary, the lady announced as dead being yet living, and the next-door neighbor of the defendant. The residence and name are truly given, though the age was greatly exaggerated. The communication was made as though coming from one known in the same parish, whose participation it seems was not even pretended, the whole being traced to the defendant. The presiding judge held the writing to be a libel, if conceived and pub-

lished falsely and maliciously. This question has been settled by the jury, together with other facts necessary to the maintenance of the action, against the defendant, and his first motion in this court is to arrest the judgment, "because the writing declared on is not a libel."

Eminent jurists, it has been said, have declared they had not been able to find a satisfactory definition of a libel. "It seemeth that a libel, in a strict sense, is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule:" Hawk. P. C., c. 73, sec. 1.

This definition has long been familiar to the ears of the profession, and any case falling within its range will be universally regarded as well sustained. In my investigations on this subject, I find these elements discussed and variously applied. Mr. Hamilton, in a learned argument before the court in New York, "ventured with diffidence," after alluding to the embarrassment of Lord Camden, to submit the following definition: "A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals:" *People v. Crosswell*, 3 Johns. Cas. 354. This definition is subsequently approved and adopted by the court: *Steele v. Southwick*, 9 Johns. 214.

The principle on which such actions are sustained is rather narrowly laid down by not observing the distinction which obtains between written and oral slander. Notwithstanding the hesitation expressed by Mansfield, C. J., in *Thorley v. Kerry*, 4 Taunt. 355, he admits it was then too late to deny, the difference having been recognized long before. In *Villers v. Monsley*, 2 Wils. 403, Bathurst, J., held that writing and publishing anything of a man that rendered him ridiculous is a libel, and actionable. In *Bell v. Stone*, 1 Bos. & Pul. 331, written words of contumely were held to be actionable. In *Cook v. Ward*, 6 Bing. 409, in which a verdict had been rendered for the plaintiff, Sergeant Jones moved in arrest of judgment, because there was nothing in the alleged libel calculated to injure the plaintiff, or even to make him the object of ridicule. The production complained of was a dull joke, intended, no doubt, as it was admitted, to raise a laugh, an effect which, by the way, it was proved to have produced. The case is instructive on the point under consideration, and the verdict was sustained, because of the tendency of this writing to render the plaintiff ridiculous,

and notwithstanding its ludicrous character, the additional proof of the consequences was held admissible, as at once identifying the subject of the libel, and showing the necessary result from its publication. In *Steele v. Southwick*, 9 Johns. 214, to publish maliciously of one that he had testified with levity was held to be cause of action; for although, says the judge, the words do not import perjury in a legal sense, the view was doubtless to hold the individual up to contempt and ridicule; and the court in their judgment say that *Villers v. Monsley*, *supra*, asserts a doctrine founded in law, justice, and sound policy.

I think the case of *Southwick v. Stevens*, 10 Johns. 443, still more to the point. The writing might well be denominated a piece of sarcastic irony. A verdict was rendered for plaintiff in that case. The publication was of the following import: "It is with unfeigned grief we inform our readers that Southwick, late editor of the Albany Register, has become insane; the progress of his malady has been observed for some time past; and at length, much to the regret of his friends and his adversaries, it has resulted in a confirmed lunacy," etc. This was held by the circuit judge, "though merely ironical, yet as holding up the plaintiff in a ridiculous point of light, and in that view it was libelous." It was in vain that the counsel for the defendant urged before the appellate tribunal that the matter set forth as a libel was so innocent and harmless that it could not be deemed a libel, especially under the circumstances, and when published of the printer of a newspaper. The ruling of the judge was sustained by the entire court. Such authorities, I presume, might be greatly multiplied. I will only add references to *Lake v. King*, 1 Saund. 120, 131; *Bradley v. Methwyn*, 2 Sel. N. P. 1062, note 2; and *Cropp v. Tilney*, 3 Salk. 225. In the last case Holt, C. J., says: "Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous."

It remains only to inquire whether the publication in question does hold up the plaintiff "to public hatred, contempt, or ridicule."

In the judgment of this court, such a notice in the public gazettes was well calculated to subject one, under such circumstances, to ridicule; was intended and calculated to impair this lady in the enjoyment of society, and to throw a contempt on her which might affect her general comfort. Such, I think, is the ready response of every bosom; and to allow the press to be

the vehicle of such malicious ridicule of private persons, and yet the offender escape with impunity, would shock the moral sense and vitiate the moral taste of the community. According to the rule established by the cases referred to, the publication being false and malicious, was libelous and sufficient to maintain the action.

In reference to the ground submitted for a new trial, it is unnecessary to consider the point raised. The brief informs us that the writings in question were not exhibited to the jury in argument, nor were they before them in their deliberations.

The motion in arrest of judgment and for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS, and GLOVER, JJ., concurred.

Motion-dismissed.

PUBLICATION CALCULATED TO SUBJECT ONE TO CONTEMPT OR RIDICULE IS LIBELOUS: *Miller v. Buller*, 52 Am. Dec. 768, and cases cited in the note 770; *Rice v. Simmons*, 31 Id. 766.

WORDS TO BE ACTIONABLE MUST HAVE BEEN PUBLISHED WITH MALICE EITHER EXPRESS OR IMPLIED: *Hart v. Reed*, 35 Am. Dec. 179.

GARRETT v. RHAME.

[9 RICHARDSON'S LAW, 407.]

ALLOWING CHATTEL PURCHASED AT SHERIFF'S SALE TO REMAIN IN POSSESSION OF DEBTOR is not fraudulent as to creditors, when the purchaser was not a creditor, and purchased *bona fide*.

TRANSFER OF CHATTEL BY PURCHASER TO INFANT SON OF DEBTOR, upon debtor's refunding purchase money and interest to such purchaser, who, as he was not a creditor, and purchased *bona fide*, acquired title to the property at a sheriff's sale thereof as the property of the debtor, notwithstanding he allowed the debtor to retain possession of it, is not fraudulent as to creditors, and does not subject the property to execution for the debtor's debts in the absence of proof of actual fraud; and the debtor's possession prior to the transfer is subject to the purchaser's title, and his subsequent possession will be intended to be that of a guardian.

TROVER for a slave by John A. Garrett against John C. Rhame, the late sheriff. The slave was sold under execution against Thomas Garrett, and was purchased by Richardson, who had been requested by Thomas Garrett to befriend him, who paid his own money, and took a bill of sale to himself. Four years afterwards, after Thomas Garrett had refunded the purchase money with interest to Richardson, the latter, by bill of sale, transferred the slave, at the request of Thomas Garrett, to the

plaintiff, who was the son of Thomas Garrett, and not above twelve years of age. Ten years after the first sale the defendant, who was then sheriff, sold the slave again, under *f. fa.* against Thomas Garrett; and, in behalf of creditors, he contended that the plaintiff's title was fraudulent and void. Thomas Garrett was insolvent at all times after the first sale. Upon the day of the first sale to Richardson the negro returned immediately into the possession of Thomas Garrett. The bill of sale was not made to the plaintiff until the whole purchase money was refunded. The plaintiff, after the first sale, lived with his father, Thomas Garrett; and the negro remained in the possession of the latter from the first sale until the plaintiff attained his majority, and afterwards until the levy was made by the defendant. To the jury was submitted, besides the other questions of fact, the question whether there was any fraudulent agreement between Richardson and Thomas Garrett before Richardson acquired title; and if not, the jury were instructed that there was a good title in Richardson, and that the transfer of it to the plaintiff was not so affected by a subsequent payment of purchase money by Thomas Garrett that thereby there was vested in Thomas Garrett any legal title subject to execution. Verdict was for the plaintiff. The defendant appealed and moved for a new trial.

Spain, for the appellant.

Blanding, *contra*.

By Court, GLOVER, J. By the sheriff's bill of sale, Bob was legally transferred to W. E. Richardson, and the purchase money was applied to the satisfaction of judgments against Thomas Garrett. To impeach the title for fraud, the defendant must show that W. E. Richardson purchased with a secret intent of defeating the claims of creditors. But all the facts of this case directly contradict such a conclusion. Richardson was not a creditor, the sale was public, and the possession of Thomas Garrett, which immediately followed, was consistent with fair dealing. That a stranger permits property to go into the possession of another from benevolent motives, cannot be regarded a badge of fraud. After judgment creditors have appropriated the fruits of a first sale, they may not afterwards recapture the property in the hands of *bona fide* purchasers and resell it in satisfaction of their debts.

While the title continued in Richardson and the possession in Thomas Garrett, the circumstances of this case are in no respect

different from the case of *Kidd v. Rawlinson*, 2 Bos. & Pul. 59. B became the purchaser of A's goods, which were sold by the sheriff; he took a bill of sale and permitted them to remain in A's possession. A afterwards executed a bill of sale of the same goods to C, a creditor, who took possession; whereupon B brought an action against C, and it was held that he was entitled to recover. Lord Eldon, C. J., says: "It appears to me that this case does not fall within the principle of *Twyne's Case*, 3 Co. 80, and the other cases on this subject, where the parties stood in the relation of debtor and creditor, and where their object was to defeat other creditors. This seems to me a new case; for here the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose."

But it was argued that when Thomas Garrett refunded the purchase money and interest, and at his request Richardson transferred Bob by bill of sale to the plaintiff, it was with a fraudulent purpose to prevent the payment of his debts. It may be that the amount refunded to Richardson was the money of Thomas Garrett; but has the legal title to Bob ever been in Thomas Garrett? and has he ever had such a legal interest in him as would be subject to levy and sale under a *fieri facias*? His possession, while the title was in Richardson, was never adverse to Richardson's right of property; and his possession after the title passed to the plaintiff, who was an infant, will be intended to be a possession as guardian.

On refunding the purchase money and interest, if Bob had been conveyed to the plaintiff in trust for Thomas Garrett, with the view of protecting him from his creditors, they might reach such a trust in equity, and if within the 29 Car. II., by an execution at law. If a trust resulted in favor of Thomas Garrett, it is not the subject of levy and sale: *Bauskett v. Holsonback*, 2 Rich. L. 624.

Whether the possession of Thomas Garrett conferred a title, and whether there was any fraud in the transaction which could defeat the legal rights of the plaintiff, were submitted to the jury by the circuit judge, with proper instructions, and we are satisfied with their verdict.

Motion dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNEZ, and MUNRO, JJ., concurred.

Motion dismissed.

RETENTION OF POSSESSION OF CHATTEL BY DEBTOR AFTER SALE THEREOF ON EXECUTION does not avoid the sale, if it is free from fraud in other respects: *Kuykendall v. McDonald*, 57 Am. Dec. 212; *McMichael v. McDermott*, 55 Id. 500; *Walter v. Gernant*, 53 Id. 491; *Garland v. Chambers*, 49 Id. 63; *Stovall v. Farmers' etc. Bank*, 47 Id. 85; *Foster v. McGregor*, 34 Id. 713; see also *Pringle v. Rhame*, *post*, p. 569.

ROWE v. MOSES.

[9 RICHARDSON'S LAW, 423.]

EXEMPLARY DAMAGES MAY BE AWARDED IN ACTIONS FOR ASSAULT AND BATTERY.

PECUNIARY CIRCUMSTANCES OF DEFENDANT MAY BE CONSIDERED IN FIXING DAMAGES in an action for assault and battery.

TRESPASS for assault and battery, made without just provocation. The defendant used much profanity against the plaintiff, and struck him two blows with a cane before the plaintiff returned a blow. Evidence was introduced to the effect that the defendant was a man of substance. The court instructed that the superiority of the pecuniary condition of the defendant over that of the plaintiff was not to be considered, further than that the ability of the defendant to pay was one of the circumstances which formed a just measure of damages. Verdict was for the plaintiff for five hundred dollars. The defendant appealed and moved for a new trial, on the ground that the latter part of the instruction was erroneous, and that the verdict was excessive and contrary to the evidence.

J. S. G. Richardson and Bellinger, for the appellant.

J. S. Richardson, jun., contra.

By Court, O'NEALL, J. The right of the jury in actions for assault and battery to find vindictive damages has never before been questioned within my knowledge. In *Chanellor v. Vaughan*, 2 Bay, 416, the jury, we are told by the reporter, found heavy damages in the case of a very unprovoked assault. The judges then said: "It was their [the jury's] province to weigh well and consider all the circumstances of the case, and to assess such damages as they thought would be commensurate with the nature of the injury, and such as would effectually check such an evil." This direction has been in all subsequent cases followed, and it may be here remarked that although the party defendant in assault and battery may be liable both civilly and criminally, yet the damages found on the civil side of the court,

if they are regarded as a sufficient punishment, uniformly make the punishment criminally nominal.

But the objection mainly relied upon was that the judge should not have said to the jury that "the ability of the defendant to pay was one of the circumstances which formed a just measure of damages." I think there was nothing erroneous in this. For certainly damages might be oppressive, excessive, and ruinous to a poor man which would be a mere trifle out of the treasury of a rich one. Can the law be so absurd as to call that redress which would be laughed to scorn by a defendant of wealth?

I do not intend to follow the learned counsel through the mazes of the labyrinth of legal learning in which they involved themselves. All this may be well enough for lawyers, but judges are to decide, not talk. Hence a few reasons derived from a few cases will answer my purpose. The general rule is very well stated in a recent work: 3 Graham & Waterman on New Trials, 1120. "In actions of assault and battery, or of slander, there is no rule by which the damages may be measured, but the same must be left to the discretion of the jury." To exercise that discretion properly, must they not know not only the rank and condition in life of the parties, but also, as a part of it, the ability of the defendant to pay? In *Bump v. Betts*, 23 Wend. 85, the court, in deciding on the question of excessive damages, turn to the facts that the defendant had the command of great wealth, and that the plaintiff was a poor man, as two of the circumstances justifying the heavy verdict. In *McConnell v. Hampton*, 12 Johns. 235, proof was received that General Hampton, the defendant, was in the receipt of an annual income of sixty thousand dollars. Such evidence was received to justify a heavy verdict, and to show the ability of the defendant to pay.

In my long experience as a lawyer and a judge, I never knew an exception taken in actions for assault and battery, slander, malicious prosecutions, and malicious torts, generally, to evidence of the defendant's wealth; and if such proof could now be excluded, or the judge restrained from commenting on it as a measure of damages, it would be in fact to reverse a course of justice coeval with the administration of it by the courts of this state.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

PECUNIARY CIRCUMSTANCES OF PARTIES AS AFFECTING MEASURE OF DAMAGES—PECUNIARY CIRCUMSTANCES OF DEFENDANT.—Evidence of the pecuniary circumstances of the defendant are admissible in two classes of cases: 1. Where the case is one in which exemplary damages may be awarded; 2. Where the case is of such a nature that the wealth of the defendant increases the wrong inflicted. And a third class might perhaps be made in actions for breach of promise of marriage, where the wealth of the defendant is admissible to show the extent of the plaintiff's loss; though this class may properly fall under the second of the above classes.

Admissible in Awarding Exemplary Damages.—Notwithstanding the efforts of Mr. Greenleaf, exemplary damages are very generally awarded at the present day in cases of malicious and wanton torts, and the like. And in such cases as these, since part of the damages are avowedly awarded for the purpose of punishing the defendant, if he is a man of large means and great pecuniary resources, he will not be punished adequately by a money verdict which would be fully sufficient for this purpose when rendered against a defendant of little means. An amount that might be extremely punitive to a defendant of small or moderate means would be light and trivial to a defendant of very much larger means: *Brown v. Evans*, 8 Saw. 491; S. C., 17 Fed. Rep. 912; *Sloan v. Edwards*, 61 Md. 101; *Meibus v. Dodge*, 38 Wis. 300. Therefore, in such cases and upon this ground, the pecuniary circumstances of the defendant become material and relevant, and may be considered by the jury in determining the amount of their verdict: *Brown v. Evans*, 8 Saw. 488; S. C., 17 Fed. Rep. 912; *Sloan v. Edwards*, 61 Md. 89; *McCarthy v. Niskern*, 22 Minn. 90; *Belknap v. Railroad*, 49 N. H. 358, 373, 374; *Brown v. Swineford*, 44 Wis. 282, 291-294; *Clem v. Holmes*, 33 Gratt. 722; S. C., 36 Am. Rep. 793; see also cases cited *infra*. In *Bump v. Betts*, 23 Wend. 85, which was an action for malicious prosecution, it was held that the damages were not excessive, considering the wealth of the defendant and the poverty of the plaintiff.

But if there are no aggravating circumstances, such as will authorize exemplary damages, then evidence of the pecuniary circumstances of defendant will not be admissible, for they are not relevant or material in a case for compensatory damages where the plaintiff is to be compensated for his actual damage and the defendant is not to be punished otherwise for the wrong done: *Morgan v. Durfee*, 69 Mo. 469; *Dush v. Fitzhugh*, 2 Lea, 307; *Belknap v. Railroad*, 19 N. H. 358, 373, 374; *Taber v. Hulson*, 5 Ind. 322; S. C., 61 Am. Dec. 96. Though where only compensatory damages are awarded, if the defendant's wealth contributes to the injury, it will then become relevant, as we shall see. But even in a case calling for exemplary damages, the wealth of the defendant is not a legitimate subject of argument by counsel if no evidence has been introduced concerning it: *Brown v. Swineford*, 44 Wis. 282, 291-294.

In Iowa, evidence of the defendant's pecuniary circumstances is not admitted, even with a view to exemplary damages: *Hunt v. O. & N. W. R. R. Co.*, 26 Iowa, 363; *Guengerech v. Smith*, 34 Id. 348, overruling *Karney v. Paisley*, 13 Id. 89, Beck, C. J., dissenting.

Admissible when Injury Increased by Wealth of Defendant.—The rule that in cases of malicious and wanton torts, where exemplary damages may be awarded, evidence of the defendant's pecuniary circumstances is admissible, must be considered as settled in view of the numerous authorities. But Mr. Greenleaf, owing to his hostility to the principle of exemplary damages, has said: "Nor are damages to be assessed merely according to the defendant's ability to pay; for whether the payment of the amount due to the plaintiff as compensation for the injury will or will not be convenient to the defendant

does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive. But so far as the defendant's rank and influence in society, and therefore the extent of the injury, are increased by his wealth, evidence of the fact is pertinent to the issue:" 2 Greenl. Ev., sec. 289. This is a correct statement of the rule obtaining in our second class of cases. But it is incomplete, inasmuch as the defendant's ability to pay is considered in awarding exemplary damages. In this second class of cases, however, such as slander, libel, seduction, or breach of promise, where the injury inflicted is increased by the social power and position of the defendant and his rank in the community, his pecuniary circumstances, as an element that goes to make up this rank and influence in society, may be introduced in a case where only compensatory damages may be awarded. The rule is thus stated by Hosmer, C. J., in *Bennett v. Hyde*, 6 Conn. 27: "Great wealth is generally attended with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and, as a consequence not uncommon, of small influence." And in *Johnson v. Smith*, 64 Me. 555, it is said: "So far as the cause of action rests upon an injury to the character or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful acts the greater." For further authorities on this head, see *infra*, "Slander and Libel," "Seduction," "Breach of Promise."

In such cases as these, it has been held that the defendant's pecuniary circumstances should be proved by general reputation rather than by particular facts, for it is the defendant's position in society that gives his slanderous statements character and weight, and it is his reputation for wealth rather than its actual possession that confers this position generally: *Stanwood v. Whitmore*, 63 Me. 200 (slander); *Johnson v. Smith*, 64 Id. 555; *Knifren v. McConnell*, 30 N. Y. 285, 289 (breach of promise); see *White v. Murland*, 71 Ill. 250 (seduction). But in cases for exemplary damages the evidence should be particular: *Sloan v. Edwards*, 61 Md. 101.

Defendant's Proof in Rebuttal.—The defendant may prove in rebuttal that part of his property has been sold without his consent, after the suit was commenced, to satisfy a prior debt: *Sprague v. Craig*, 51 Ill. 283 (breach of promise). In cases where it is competent for the plaintiff to prove the wealth of the defendant to increase the damages, it is equally competent for the defendant to show a want of it to diminish them. Nor can he be deprived of this right by the omission of the plaintiff to offer any proof on that point or make any claim for damages on that ground: *Johnson v. Smith*, 64 Me. 553 (assault); see also *Karney v. Paisley*, 13 Iowa, 89, 92 (doubted in *Guengerich v. Smith*, 34 Id. 348, on the point of admitting evidence of pecuniary circumstances at all).

Cases against Two or More Defendants.—In an action against two or more to recover for an injury to the plaintiff, in which the plaintiff is entitled to exemplary damages by reason of the conduct of the defendants which occasioned the injury being willful, wanton, or malicious, the pecuniary ability of one defendant should not be considered by the jury in determining the damages which a co-defendant shall have assessed against him: *Railroad Co. v.*

Smith, 54 Ill. 517. An instruction that the jury might take into consideration the pecuniary ability of each of three defendants to pay damages was held erroneous, though exemplary damages were allowable, because, as they were liable jointly, and their wealth varied greatly, the verdict would be harder on some than on others. And it was held that the jury ought to consider what the plaintiff ought to receive, the defendants' wealth being a mere aggravation of the injury: *Smith v. Wunderlich*, 70 Id. 426, 437. But in *Bell v. Morrison*, 27 Miss. 68, it is held that in a case of joint tort, where the defendants join in their pleas, the jury must assess damages against the defendants jointly, according to the amount which in their judgment the most culpable of them ought to pay, and evidence of the wealth of one of the defendants was received, *Fisher, J.*, dissenting.

ASSAULT AND BATTERY.—We now proceed to classify, according to the nature of the action, the cases in which evidence of the defendant's wealth has been admitted. In an action for assault and battery, where the circumstances of the case are such as to render the recovery of exemplary damages permissible, the pecuniary circumstances of the defendant are admissible in evidence for the reasons above stated: See *supra*, "Admissible in Awarding Exemplary Damages;" *Brown v. Evans*, 8 Saw. 488; S. C., 17 Fed. Rep. 912; *McNamara v. King*, 2 Gilm. 437; *Jones v. Jones*, 71 Ill. 562; *Johnson v. Smith*, 64 Me. 553; *Gaither v. Blowers*, 11 Md. 536; *Sloan v. Edwards*, 61 Id. 89; *Bell v. Morrison*, 27 Miss. 68, 85, 86; *Harris v. Marco*, 16 S. C. 575 (citing and following the principal case); *Birchard v. Booth*, 4 Wis. 67; *Barnes v. Martin*, 15 Id. 240; *Brown v. Swineford*, 44 Id. 282, 291-294. The action in *Harris v. Marco*, *supra*, was for assault and battery and false imprisonment, as was also the case in *McConnell v. Hampton*, 12 Johns. 236, 237, in which the wealth of the defendant was considered, but the damages were, notwithstanding this, held to be excessive. In an action against an innkeeper, who, after a guest had engaged and paid for a night's lodging, refused to let him have it, and turned him out of the house with abusive and insulting language, exemplary damages were recoverable and the pecuniary circumstances of the defendant were admissible: *McCarthy v. Niskern*, 22 Minn. 90.

In some states exemplary damages are not recoverable in an action for assault and battery, on the ground that it is punishable criminally. And in such states as only compensatory damages may be given, the wealth of the defendant cannot be considered: *Tuber v. Hutson*, 5 Ind. 322; S. C., 61 Am. Dec. 96. In Iowa, though punitive damages may be awarded in assault and battery, the wealth of the defendant cannot be considered, the court deviating from the weight of authority: *Guengerech v. Smith*, 34 Iowa, 348, overruling *Karney v. Paisley*, 13 Id. 89, *Beck, C. J.*, dissenting.

BREACH OF PROMISE OF MARRIAGE.—Pecuniary circumstances of the defendant may be considered by the jury in estimating the damages in an action for breach of promise of marriage: Note to *Burnham v. Cornwell*, 63 Am. Dec. 546; *James v. Bidlington*, 6 Car. & P. 590. The defendant's poverty ought not to decrease the damages in an action of breach of promise: *Coryell v. Colbaugh*, 1 Am. Dec. 192.

MALICIOUS PROSECUTION.—As exemplary damages may be awarded in actions for malicious prosecution, the pecuniary circumstances of the defendant may be considered in determining the amount of the damages: *Bull. N. P. 13*; *Whitfield v. Westbrook*, 40 Miss. 311; *Winn v. Peckham*, 42 Wis. 493.

SEDUCTION—CRIM. CON.—ADULTERY.—Evidence of the pecuniary circumstances of the defendant in an action for seduction is admissible: Note to

Weaver v. Bachert, 44 Am. Dec. 175. In *Applegate v. Ruble*, 2 A. K. Marsh. 128, the court refused to set aside damages given in a suit for seduction when they amounted to one tenth of the defendant's estate. In *White v. Murland*, 71 Ill. 250, this evidence was held to be admissible in aggravation of damages, and "perhaps" for the purpose of fixing a standard for exemplary damages, but not to show the defendant's ability to pay. Where a woman sues for damages for her own seduction, as she may do in Indiana, evidence of the pecuniary circumstances of the defendant is admissible on the question of compensatory damages: *Wilson v. Shepler*, 86 Ind. 275. Evidence of the defendant's pecuniary circumstances may be admitted in actions for seduction, on the ground that exemplary damages may be awarded: *Grable v. Margrave*, 3 Scam. 372; S. C., 38 Am. Dec. 88, and note 90; *McAulay v. Birkhead*, 13 Ired. L. 28; S. C., 55 Am. Dec. 427; *Lavery v. Crooke*, 52 Wis. 612; S. C., 38 Am. Rep. 768. In an action by a husband for criminal conversation with his wife, as punitive damages may be awarded, the wealth of the defendant may be considered in estimating the damages: *Rea v. Tucker*, 51 Ill. 112; *Peters v. Lake*, 66 Id. 208. It was held not to be admissible in such an action in *James v. Biddington*, 6 Car. & P. 590. In an action for adultery, such evidence is not admissible unless the defendant used his wealth as a means of seduction: *Cowing v. Cowing*, 33 L. J. P. M. & A. 149; *Forster v. Forster*, 33 Id. 150, note.

SLANDER AND LIBEL.—In actions for slander and libel, the pecuniary circumstances of the defendant are admitted in evidence upon both of the grounds stated at the beginning of this note. Where exemplary damages may be awarded, the defendant's pecuniary ability to pay a judgment may be considered, because if he is wealthy, a larger verdict must be given in order to punish him: *Hayner v. Cowden*, 27 Ohio St. 292; *McAlmont v. McClelland*, 14 Serg. & R. 362, 363; *Fry v. Bennett*, 4 Duer, 247, 262; *Buckley v. Knapp*, 48 Mo. 152; *Burckhalter v. Coward*, 16 S. C. 435, citing and following the principal case. But see *Palmer v. Haskins*, 28 Barb. 90. On the other hand, even when compensatory damages only are to be awarded, the pecuniary circumstances of the defendant may be introduced in evidence as an element which goes to make up his rank and influence in society, for his social position and influence in the community will affect the amount of injury done by the libel or slander. If he occupies a high and influential position, his words will have a much more serious effect than if he were of little importance in the community. Therefore in such cases the pecuniary circumstances of the defendant will be admissible as going to show his influence, and the consequent injury accruing from his utterances: See *supra*, "Admissible when Injury Increased by Wealth of Defendant;" *Bennett v. Hyde*, 6 Conn. 24, 27; *Hosley v. Brooks*, 20 Ill. 115; *Karney v. Paisley*, 13 Iowa, 89, 92, overruled in *Guengerech v. Smith*, 34 Id. 348; *Humphries v. Parker*, 52 Me. 507; *Stanwood v. Whitmore*, 63 Id. 209; *Shute v. Barrett*, 7 Pick. 82, 86; *Lewis v. Chapman*, 19 Barb. 252. See *Schmisser v. Kreilich*, 92 Ill. 347. But the jury must be cautioned against allowing such evidence too much weight, or in itself to swell the amount of damages: *Brown v. Barnes*, 39 Mich. 211; S. C., 33 Am. Rep. 375, citing *Threadgoat v. Litogot*, 22 Id. 271. And it is said that where such evidence is admitted for the purpose of showing the influence of the defendant in the community, the evidence should be confined to the general reputation of the defendant for wealth: *Stanwood v. Whitmore*, 63 Me. 209; see *supra*, "Admissible when Injury Increased by Wealth of Defendant." There are a few authorities that hold that the defendant's wealth is inadmissible in an action of slander or

show that his slanders were more damaging: *Ware v. Cartledge*, 24 Ala. 622; S. C., 60 Am. Dec. 489; *Morris v. Barker*, 4 Harr. (Del.) 520; *Holmes v. Holmes*, 64 Ill. 294; *Palmer v. Haskins*, 28 Barb. 90; see *Case v. Marks*, 20 Conn. 248. In *Palmer v. Haskins*, 28 Barb. 90, it was said that the general standing of the defendant in society might be shown, but the decision seems to be that the wealth of the defendant cannot be shown for the purpose of having the jury infer the social position from this alone: See also *Ware v. Cartledge*, 24 Ala. 622; S. C., 60 Am. Dec. 489, 492.

TRESPASS FOR NEGLIGENCE, NUISANCE, ETC.—Where the action is for a tort in which exemplary damages are recoverable, the pecuniary circumstances of the defendant may enhance such damages: *McBride v. McLaughlin*, 5 Watts, 375, which was a case for the willful and malicious abuse of process, and sale of the plaintiff's property; *Meibus v. Dodge*, 38 Wis. 300, which was an action for negligence in allowing a ferocious dog to run at large. But where the defendant's negligence is not of the sort for which exemplary damages are allowed, evidence of the defendant's wealth will not be admissible: *City of Chicago v. O'Brennan*, 65 Ill. 164; *Dush v. Fitzhugh*, 2 La. 307; *Barbour County v. Horn*, 48 Ala. 566. As under the statute damages for causing a person's death can only be the pecuniary loss, the defendant's wealth cannot be taken into consideration: *Conant v. Griffin*, 48 Ill. 410. And even if exemplary damages were recoverable by the statute, the evidence would not be admissible where there were no such aggravating circumstances as would justify the awarding of exemplary damages: *Morgan v. Dufree*, 69 Mo. 469. Evidence that defendant was a man of wealth is not admissible in an action for damages resulting from a nuisance erected and maintained by him, since actual damages only are recoverable: *Meyers v. Malcolm*, 6 Hill, 292; S. C., 41 Am. Dec. 744.

EVIDENCE—HOW PECUNIARY CIRCUMSTANCES OF DEFENDANT MAY BE PROVED: See *supra*, "Admissible when Injury Increased by Wealth of Defendant;" "Defendant's Proof in Rebuttal;" note on seduction, *Weaver v. Bachert*, 44 Am. Dec. 175. In an action for assault and battery, the testimony of a witness as to the pecuniary condition of the defendant should not be allowed to go to the jury when it does not appear that he spoke from personal knowledge, or that his information was derived from any proper or competent source; nor when the answer of the witness conveys no definite idea of the extent of the defendant's means: *Sloan v. Edwards*, 61 Md. 89. In an action for assault and battery, where exemplary damages were allowable, an affidavit made by the defendant for a change of venue in the case, which showed, among other things, that he owned a large amount of property, was admissible on the trial for the purpose of showing his wealth. The court, however, if requested, should have limited the reading of the affidavit to such parts as related to that subject: *Barnes v. Martin*, 15 Wis. 240. Where, however, no evidence of the defendant's wealth has been introduced, it is not a legitimate subject of argument by counsel: *Brown v. Swinford*, 44 Wis. 282, 291-294. Evidence of the pecuniary condition of the defendant's father is not admissible in a breach of promise suit: *Miller v. Rosier*, 31 Mich. 375.

PECUNIARY CIRCUMSTANCES OF PLAINTIFF.—The pecuniary circumstances of the plaintiff are admitted in evidence much less often than those of the defendant. And though such evidence has been held admissible, on the ground that the case was one for exemplary damages: *Hencky v. Smith*, 10 Or. 349; S. C., 45 Am. Rep. 143 (assault and battery); *Gaither v. Blowers*, 11 Md. 536 (assault and battery); and it is elsewhere intimated that this evidence is

admissible where exemplary damages are recoverable: *Clements v. Mahoney*, 55 Mo. 352 (seduction); *Chicago v. O'Brennan*, 65 Ill. 160, 164 (negligence); *Pennsylvania Co. v. Roy*, 102 U. S. 451 (negligence); yet it is usually admitted, if at all, on the ground that the pecuniary circumstances of the plaintiff are directly involved in estimating the damages caused by the tortious act, the poverty of the plaintiff making the injury the greater. In *Reed v. Davis*, 4 Pick. 215, 219, which was an action of trespass *quare clausum fregit*, the damages were held to be not excessive, taking into consideration the character of the act and the poverty of the plaintiff.

ASSAULT AND BATTERY.—In an action for assault and battery, the pecuniary circumstances of the plaintiff and the dependent condition of his family may be given in evidence to increase the damages: *Sloan v. Edwards*, 61 Md. 89; especially where the case is one for exemplary damages: *Gaither v. Blowers*, 11 Ill. 536; *Hencky v. Smith*, 10 Or. 349; S. C., 45 Am. Rep. 143. And this evidence is also admissible on the ground that the poverty of the plaintiff makes the injury inflicted by the tort the greater. Thus where the husband and wife sued for an assault upon the wife, it was said that the pain and suffering may be much greater where from the husband's pecuniary condition he is unable to furnish medical aid, remedies, apartments, and nursing, such as ample means would afford, and therefore evidence of the pecuniary condition of the husband tended to show the extent of the injury: *Cochran v. Amon*, 16 Ill. 316. And in *McNamara v. King*, 2 Gilm. 432, it was said: "The consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly upon his manual exertions for the support of himself and family, than to an individual differently situated in life."

BREACH OF PROMISE.—In an action for breach of promise, the plaintiff may show that she has no independent means, her injury being by this fact rendered the greater: *Vanderpool v. Richardson*, 17 N. W. Rep. 936 (Mich.), *per Cooley, J.*, cited in note on breach of promise, *Burnham v. Cornwell*, 63 Am. Dec. 547.

MALICIOUS PROSECUTION.—In an action for malicious prosecution, the damages were held not to be excessive, considering the wealth of the defendant and poverty of the plaintiff: *Bump v. Betts*, 23 Wend. 85.

NEGLIGENCE.—In an action for personal injuries, the plaintiff's wealth or poverty is an immaterial issue, although he may show the nature of his business and the value of his services in conducting it: *Missouri Pacific R. R. Co. v. Lyde*, 57 Tex. 505; *Dreiss v. Friedrich*, 57 Id. 70; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Barbour County v. Horn*, 48 Ala. 566. In an action by a servant of a railroad company against the company for personal injuries received through the company's negligence, it is error to admit evidence that the plaintiff had a family and was unable to support them by his labor since the injury. To admit such evidence is virtually to impose upon the company the duty of supporting the plaintiff's family, which the law does not require: *Railway Co. v. Powers*, 74 Ill. 343. In an action against a city to recover damages for a personal injury received from negligence, it was error to allow the plaintiff to testify that he had a wife, seven young daughters, and two sons, whom he was supporting at the time of the accident, since it was not a case for exemplary damages: *Chicago v. O'Brennan*, 65 Ill. 160.

NEGLIGENCE CAUSING DEATH.—Actions for injuries causing death are purely statutory, and the damages to be recovered therein are usually confined to the actual pecuniary loss. In such actions the pecuniary circum-

stances or poverty of the husband, wife, parents, or next of kin of the deceased is not to be taken into consideration on the question of damages: *Chicago etc. R. R. Co. v. Howard*, 6 Ill. App. 569; *Chicago etc. R. R. Co. v. Henry*, 7 Id. 322; *Chicago v. McCulloch*, 10 Id. 459; *Illinois Central R. R. Co. v. Baches*, 55 Ill. 379, 388. It is proper to show the amount of the usual earnings of the deceased, and that the plaintiff was his wife, and that they had minor children whom it was the legal duty of the deceased to support; but it is error to admit evidence that the plaintiff and her children had no other means of support besides this: *Chicago etc. R. R. Co. v. Moranda*, 93 Id. 302. A verdict against a railroad company for ten thousand dollars for negligence in causing the death of a switchman should be set aside, it appearing that the next of kin entitled to the benefit of the verdict was a mother in comfortable pecuniary circumstances, who had derived no profit from the earnings of her son, nor was likely to profit by his earnings had he lived: *Atchison etc. R. R. Co. v. Brown*, 26 Kan. 443. But in an action of negligence for causing death, it may be shown that there is a reasonable expectation of pecuniary advantage from a person bearing the family relation, and the destruction of such expectation by the negligence causing the death of the party from whom it arose will sustain the action. It is not necessary to sustain the action that the next of kin should have a legal claim upon the deceased for support: *Pennsylvania R. R. Co. v. Adams*, 55 Pa. St. 499; *Pennsylvania R. R. Co. v. Keller*, 67 Id. 300; see *Atchison etc. R. R. Co. v. Brown*, 26 Kan. 443. In an action by a mother for causing the death of her son, evidence of her indigent condition and dependence upon the son is admissible to show the reasonable expectation of pecuniary assistance from the deceased, but not for the purpose of increasing the amount of damages: *International etc. R. R. Co. v. Kindred*, 57 Tex. 491; *Potter v. Chicago etc. R'y Co.*, 21 Wis. 372.

SEDUCTION.—Pecuniary circumstances and social position of both parties may be shown: Note to *Weaver v. Bachert*, 44 Am. Dec. 175. In a suit by plaintiff for her own seduction, evidence of her financial condition was not admissible to affect the question of damages: *West v. Druff*, 55 Iowa, 335. And in this case it was said that the plaintiff did not claim or show that the defendant availed himself of her poverty to effect her seduction.

SLANDER AND LIBEL.—In *Larned v. Buffington*, 3 Mass. 546, it was held that in an action of slander the plaintiff may give in evidence, to aggravate the damages, his own rank and condition of life, and also that the defendant may avail himself of such evidence when it will have a legal tendency to mitigate the damages. See *McAlmont v. McClelland*, 14 Serg. & R. 363. The pecuniary circumstances of the plaintiff and his family, and all the circumstances of the case, may be taken into consideration, and exemplary damages may be awarded: *Clements v. Mahoney*, 55 Mo. 352; *Shute v. Barrett*, 7 Pick. 82, 86. It is held that the plaintiff's poverty is not admissible in an action of slander, in *Ware v. Cartledge*, 24 Ala. 622; S. C., 60 Am. Dec. 489.

EXEMPLARY DAMAGES FOR ACT PUNISHABLE CRIMINALLY: See note to *Austin v. Wilson*, 50 Am. Dec. 770; *Porter v. Seiler*, 62 Id. 341, and cases cited in the note 347. Allowance of exemplary damages for the act of a servant: See note to *Hagan v. Providence etc. R. R. Co.*, Id. 379 et seq.

PRINGLE v. RHAME.

[10 RICHARDSON'S LAW, 72.]

SALE OF CHATTEL IN PAYMENT OF ANTECEDENT DEBT, WHERE DEBTOR RETAINS POSSESSION and use of property, is not fraudulent as to creditors, if the debtor makes a *bona fide* contract to pay hire.

DEBTOR WILL NOT BE ALLOWED TO SECURE ADVANTAGE AT EXPENSE OF CREDITORS as price of preferring one of them.

TRUVER for a slave sold by defendant as sheriff, under execution against E. D. Pringle, who had previously transferred the slave to the plaintiff in part payment of a debt due by him to the plaintiff. The slave remained in the possession of E. D. Pringle until the alleged conversion, and E. D. Pringle had given a note for seventy-five dollars to the plaintiff for the hire of the slave. At the time of the sale, and ever since, E. D. Pringle was insolvent. The jury were instructed that the circumstances attending the sale were not conclusive evidence of fraud, and it was submitted to them whether the evidence showed fraud between the plaintiff and E. D. Pringle. Verdict for plaintiff, and appeal and motion for a new trial by the defendant, on the ground, among others, that the jury were instructed that the sale of a chattel in consideration of a pre-existing debt, the chattel remaining in the possession of the vendor, was not fraud *per se*, and therefore incapable of explanation.

Moses and Spain, for the appellant.

Haynsworth and Green, contra.

By Court, WITHERS, J. The leading question presented by this case is whether it is concluded by the rule derivable from *Smith v. Henry*, 1 Hill (S. C.), 16. In that case, as in this, the facts concurred; to wit, that a debtor sold personalty (a slave in the present instance, several in the other) to an antecedent creditor, and the possession was not changed, but in each case remained with the debtor. In *Smith v. Henry*, *supra*, the debtor continued to use the property as his own, there being no fact established that he was to pay any hire; whereas in the present case a note was given for hire by the debtor. Does this fact, supposing the contract for hiring to be *bona fide*, distinguish the two cases and vindicate the doctrine held upon circuit, that possession remaining in the vendor upon the contract of hiring opened the inquiry as to fraud in the sale, and carried it to the jury as a question of contested fact?

There is no doubt we must give an affirmative answer, and maintain that the case of *Smith v. Henry*, *supra*, does not apply where such a contract for hire *bona fide* is made between vendor and vendee.

For this we have the clear and distinct authority of Judge Harper himself, who pronounced the opinion in the case of *Smith v. Henry*, *supra*. This appears in the case of *Jones v. Blake*, 2 Hill Ch. 636, 637. In that case the stipulation to pay hire was adjudged to take it out of the principle of *Smith v. Henry*, *supra*, and it is affirmed, that the language used in the latter case, and the quotations from *Twyne's Case*, 3 Co. 80, and Sheppard's Touchstone, introduced to support it, clearly import a principle which cannot apply where the debtor retains the possession after an absolute sale, in pursuance of an honest stipulation for hire.

By consulting the case of *Jones v. Blake*, cited above, it will be seen that the principle of *Smith v. Henry*, *supra*, was that the law will not allow a debtor to prefer one creditor over another; he will not be allowed to secure an advantage (that is, an advantage in relation to property, profit, or pecuniary advantage) at the expense of his creditors as the price of such preference. The creditor will not be allowed to give a bribe, which means in law pecuniary benefit, as the price of the preference given to him over other creditors. "In this case," says Chancellor Harper, "the proof is distinct and certain that the donor was to pay hire for the slaves. Can I say that his retaining possession under this stipulation was the securing a benefit to himself? I do not see how. In general, a party who hires slaves may be supposed to do so for his own convenience. But if the price be full and fair, the law must regard the transaction as an exchange of equivalents." As to the attempts which the chancellor concedes such a construction will call forth to "evade the rule as laid down in the case of *Smith v. Henry*," *supra*, he observes: "But it must be the business of the court to guard against evasions. If the stipulation were kept secret between the parties themselves, if the hire were very inadequate, if it remained for a long time not paid or demanded—all these would be circumstances to show the stipulation to be colorable or evasive." Although the word "donor" is used above, the fact of the case was, that the slaves were claimed as having been transferred to pay an antecedent debt due from Goodwyn to his daughter, Mrs. Blake, precisely of the character of the debt owing by Edwin D. Pringle to the plaintiff, in the case now under consideration.

We have, then, an exposition of *Smith v. Henry*, *supra*, peculiarly authoritative, which shows that the doctrine of that case does not exclude the evidence of hiring as matter to be weighed upon the question of fraudulent sale as between debtor and creditor. It results, necessarily, that the circuit court could not exclude the evidence of hiring by the vendor, and if not, that it could not hold the transaction before it to be subject to the legal presumption of fraud *per se*; that the question of fraud must go to the jury, who have a right to determine it. The complaint here is not that the jury were not properly admonished as to the consideration of the fact of hiring, but it is, that the ruling on circuit did not exclude the whole influence of that fact. According to the exposition of *Smith v. Henry*, already referred to, with which this court concurs, the instruction now insisted on ought not to have been given. If we were to go back to the progenitor of *Smith v. Henry*, *supra* (*Twyne's Case*, 3 Co. 80), much might be gathered in support of the exposition we have adopted; but that examination can be made by him who has occasion to make it, and need not burden this opinion.

The case of *Fulmore v. Burrows*, 2 Rich. Eq. 95, has been cited to show that an agreement to pay hire and notes executed for it will not withdraw a case from the conclusive presumption of fraud. Upon examining that case, it is found that the fact of hiring was heard as a part of the case, was considered, and was adjudged to have no weight, because it was itself held to be merely pretensive, and therefore the rule of *Smith v. Henry*, *supra*, was applied to that case. If the jury had so disposed of the like fact in the present case—and we should have been quite content if they had—we should have found here, also, a proper instance for the application of *Smith v. Henry*, *supra*.

In the case of *Molley v. Albert*, 11 MS. Opinions, 34, the sale was attacked upon the ground that there was no consideration at all for the property pretended to have been purchased; and the effort to rebut the continued possession of the vendor by evidence of hiring was held unsuccessful, for such evidence, as to any period of time, was extremely obscure, indefinite, and uncertain, and no evidence at all of hiring was given for three or four years before executions were levied upon the property; but it must be observed that evidence as to hiring was heard and considered, which ought not to be, if from the two concurring and precedent facts which make the case of *Smith v. Henry*, *supra*, the law has drawn a conclusive presumption of fraud. Thus much for the leading question in this cause.

The remaining question was whether, if the sale to the plaintiff were exempt from fraud, an execution, lodged before such sale was satisfied in full, or whether a small balance was not due. That point produced a contest in evidence, and we see no warrant to overturn the conclusion of the jury, to whom it was referred, with such instructions by the court as have originated no objection touching them in the grounds of appeal.

The general conclusion is, that the matter of fraud, in this instance, was a question of fact, and not of legal presumption conclusive and irrebuttable; that the other point also presented an inquiry of fact, and whatever we might have concluded, if lawfully charged with the questions of fact, we ought not to invade the province of the jury; and must adjudge this appeal to be dismissed.

O'NEALL, WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

SALE OF CHATTEL WITHOUT CHANGE OF POSSESSION MAY BE FRAUDULENT AND VOID as to creditors, but the retention of possession by the vendor is merely presumptive evidence of fraud, which may be rebutted by other evidence: *Jarvis v. Davis*, 61 Am. Dec. 166, and cases cited in the note 169; *Shaddon v. Knott*, 58 Id. 63. See *Garrett v. Rhame*, ante, p. 557.

DEBTOR MAY GIVE PREFERENCE TO PARTICULAR CREDITOR: *Kuykendall v. McDonald*, 57 Am. Dec. 212, and note 217.

MONTAGUE v. DENT.

[10 RICHARDSON'S LAW, 125.]

GAS CHANDELIERS AND PENDENT GAS-BURNER ATTACHED BY SCREWS TO SMALL PIPE that conveys gas into dwelling-house, and which could be detached without any escape of gas or injury to the pipe or any part of the building, do not pass under a conveyance of the freehold made upon a sale to foreclose a mortgage thereon, and the same may be sold by the sheriff under executions against the mortgagor.

RULE RESPECTING FIXTURES IS SAME BETWEEN HEIR AND EXECUTOR, vendor and vendee, and mortgagor and mortgagee.

TRESPASS *quare clausum fregit* against the sheriff for the removal and sale of gas chandeliers and a pendent hall gas-burner. The plaintiff was the purchaser of the freehold under a sale to foreclose a mortgage thereon; and the sheriff, after the foreclosure sale, sold the furniture in the house and the gas-fixtures under executions against the mortgagor. The gas-fixtures

could be detached without the escape of gas, by closing a valve above the point where they were screwed on. A motion for a nonsuit was granted. The plaintiff appealed, moving to set aside the nonsuit. The question involved was whether the gas-fixtures passed to the plaintiff by the conveyance of the freehold. Another question whether the plaintiff could maintain this action, as his deed was not delivered until after the alleged trespass was committed, was not considered by the court. The mode of annexation of the fixtures is stated in the opinion.

Bellinger, for the appellant.

Tradewell, contra.

By Court, WITHERS, J. The question is whether certain gas chandeliers and a pendent gas-burner, attached by screws to a small pipe (that conveyed gas into the dwelling-house), and which could be detached without any escape of gas, or injury to the pipe or any part of the building, passed by a conveyance of the freehold, sold under a mortgage by the commissioner in equity, as between the purchaser of the premises and the sheriff who represented the execution creditors of the mortgagor.

So various are the considerations which enter into the interpretation of the law of fixtures, dictating varying and opposite conclusions as to the same or like articles which may become the subject of controversy, that an adjudicated case may fail to be any authority where the subject-matter of contest may be the same, as the particular case must be considered with reference to the relation of parties; as whether they be landlord and tenant; heir, devisee, or reversioner, and executor of deceased tenant; vendor and vendee; manufacturer, artisan, agriculturist, farmer, and so forth. So likewise have the cases in the books adverted even to such considerations as custom, intention, ornament, convenience, and so forth. In *Buckland v. Butterfield*, 4 Moo. 440, Dallas, C. J., said: "Few decisions can be considered absolute authorities in other instances, even of fixtures of a similar denomination. Every case of the sort must depend upon its own special and peculiar circumstances." In our own decisions, as well as those of English courts, the rule upon this subject laid down for heir and executor is allowed to apply to vendor and vendee, mortgagor and mortgagee; and, say Amos & Ferard on Fixtures, p. 114, marg. 152, "there appears to be more uncertainty in the doctrine of fixtures, as it applies to the case of heir and executor, than to that of any other class of persons." In early times the executor contended with the heir

at disadvantage, and such was the temper of the courts so late as the time of Bacon's Abridgment. The rigor applied to the executor has been relaxed, however, but still, perhaps, mainly upon that clear modern rule which favors a tradesman and his representative.

The elementary idea is that the article claimed as part of the freehold must be in some way fixed in the soil, or part and parcel of that which is. "*Solo infixum*," are the words of Lord Brougham, in *Fisher v. Dixon*, 12 Cl. & Fin. 312; *vide* Amos & Ferard on Fixtures, marg. 168, before the house of lords. Now the articles embraced by this case seem to want this necessary condition to make them fixtures. The ease or difficulty with which an article may be detached may not be a satisfactory criterion, and it is not; but the effect of its detachment upon itself or some portion of what is the realty, or part and parcel of it, is a matter that enters into the question. As to this consideration the defendant has the advantage in the present case; for admitting the gas-pipe to be part of the realty purchased, the removal of the chandeliers and the pendent gas-burner did not disorder that pipe, did not mutilate it as a conduit, did not diminish or waste any gas, nor were the articles detached less perfect. Then these chandeliers, etc., were not necessary to the enjoyment of the freehold, for the use of the gas itself does not deserve to rank in that category. It is much more matter of convenience than of necessity, or even serious importance. *A fortiori* may this be said of the mere terminating joints, as it were, of the gas-pipe; things including the exercise of taste and ornament; withdrawn and replaced at pleasure; substituted by others affording more or less light, as economy or the reverse, or convenience, may dictate. Surely such a case as this cannot stand upon the foundation that supports the case of the salt-pans, upon an estate devoted to salt-making by the owner: *Lawton's Ex'r v. Salmon*, 1 H. Black. 260, notes; and our case as to a cotton-gin: *Fairis v. Walker*, 1 Bailey L. 540; in both which cases (which are only examples of many others) the controlling idea was that the full and free enjoyment of freehold conveyed, and destined to definite uses, implied the necessary use of the articles then in question, and their great importance to the obvious purposes of a purchaser.

It will be found by examination of English cases, all of them not between landlord and tenant, that the courts have sanctioned the removal of hangings, tapestry, pier-glasses, nailed to

the walls or panels of the house; and Lord Hardwicke introduced into the class of removable articles even ornamental chimney-pieces, and wooden cornices were classed with them. So also marble slabs, window-blinds, wainscot fixed to the walls by screws, and the like; premising always that the articles were not part of the fabric of the house, and the removal would not materially impair the freehold; for such consequences would prohibit the removal of even ornamental structures: See *Amos & Ferard*, App. 341. It is probable that such rules would be much restricted in our times; and they have been shaken to some extent in England; for everywhere the question must be affected by the great changes which occur in the manner of using the domicile, and (as has been already said) custom has not been excluded from consideration.

We think that in England the rule applied to heir and executor would permit the removal by vendor, or sale by sheriff on execution against him, of the articles now in question.

That rule, we may remember, has been attended, if not generated, by a maxim of jurisprudence more English than American, to wit, that in questions between heir and executor, the heir and the real estate are to be preferred; and further, that the inheritance shall never be suffered to descend to the heir prejudiced or imperfect. Our dealings with real estate in this jurisdiction have very much eviscerated the strength of such maxims, and with us the interest of the heir and the executor is much less in conflict, if it be not identical.

We forbear a discussion and decision upon the right of the plaintiff to maintain trespass; for the facts in relation to his possession are not clear, and the law upon the point considered is such as to enable and require us to adjudge that the motion be dismissed, and it is ordered accordingly.

O'NEALL, WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

GAS-FIXTURES ARE NOT FIXTURES AS BETWEEN LANDLORD AND TENANT: See *Wall v. Hinds*, 64 Am. Dec. 64; see also note to *Gray v. Holdship*, 17 Id. 691 et seq. The cases in this series on what are fixtures are collected in the note to *Wall v. Hinds*, 64 Id. 75. The principal case is cited to the point that gas-fixtures and mirrors easily detached without injury to the walls do not pass by deed or mortgage of the premises: *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 41.

LAW OF FIXTURES IS SAME BETWEEN HEIR AND EXECUTOR, vendor and vendee, and mortgagor and mortgagee: *Harkness v. Sears*, 62 Am. Dec. 742; *Degraffenreid v. Scruggs*, 40 Id. 658; *Voorhis v. Freeman*, 37 Id. 490; *Despatch Line v. Bellamy Co.*, Id. 203.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

HARRIS v. TAYLOR.

[3 SHEED, 536.]

MARRIED WOMAN CAN IN NO CASE BE SUED UPON MERE PERSONAL CONTRACT MADE BY HER DURING COVERTURE, although she lives apart from her husband.

DEFENDANT MAY SHOW IN ABATEMENT OF ATTACHMENT, in Tennessee, that the property on which the attachment was levied is not his, or he may traverse and disprove the truth of the cause stated as the ground of attachment.

HUSBAND'S MARITAL RIGHTS CANNOT ATTACH TO SLAVES belonging to an estate, of which his wife is a distributee, until division of the slaves.

HUSBAND'S CREDITORS CANNOT LAY HOLD OF WIFE'S SLAVES FOR SATISFACTION OF THEIR DEBTS until the husband's marital right is complete by a reduction of the slaves into possession, or what is equivalent thereto.

SURETIES ON REPLEVIN BOND ARE DISCHARGED BY DISCHARGE OF ONE OF TWO DEFENDANTS by the voluntary act of the plaintiff, where the undertaking of the sureties was in the joint behalf of both defendants.

ASSUMPSIT. The facts are stated in the opinion.

Kortrecht, for the plaintiff in error.

Yerger and Coleman, for the defendant in error.

By Court, McKINNEY, J. This suit was commenced by attachment against Harris and wife jointly. The writ of attachment was returned by the sheriff levied upon two slaves, Eliza and her child. The declaration is in *assumpsit* against both husband and wife, upon a joint promise by them to pay the plaintiff five hundred dollars for his services as a surgeon, rendered to the wife during coverture. The slaves attached were replevied on behalf of the wife by her trustee, who set up claim

of title to them as the separate property of the wife. The defendant Howell Harris filed two pleas in abatement—the first tendering an issue upon the truth of the cause stated as the ground for the attachment; the second tendering an issue upon the title to the slaves attached, and distinctly averring that he had no claim or title to said slaves, but that the title was vested in one William Basher, as trustee for the wife of defendant, who held the same for the sole and separate use of Mrs. Harris.

The plaintiff joined issue upon the first plea, and demurred to the second; and on argument the demurrer was sustained. The other defendant, Mrs. Harris, pleaded separately two pleas: 1. *Non assumpsit*; and 2. Coverture. There was issue upon the first plea, and a demurrer to the second, which was sustained by the court. The record shows that in the future progress of the case, and before judgment, the plaintiff entered a *nolle prosequi* as to the wife. The issue upon the first plea in abatement was found against the defendant, and the damages were assessed by the jury at the sum of five hundred and thirty-six dollars and twenty-five cents, for which the court rendered judgment against the defendant Howell Harris, and likewise against the sureties in the replevin bond, from which judgment the defendant appealed in error.

Several questions arise upon this record:

1. The court erred in sustaining the demurrer to the plea of coverture. It is clear that in no case can a married woman be sued upon a mere personal contract made by her during coverture, although she lived apart from her husband: 1 Ch. Pl. 57. She can in such case neither be sued separately, nor jointly with her husband. The plea of coverture is sufficient in substance; but if otherwise, the plaintiff's demurrer to the plea reaches back to the declaration, and raises the question as to its sufficiency in respect to matters of substance. But as the *feme* was afterwards discharged from the action, this error does not affect the merits of the case as respects the other defendant, and therefore, perhaps, constitutes no ground for reversing the judgment.

2. In the present state of our law, the attachment is a proceeding not only to enforce the appearance of the defendant, but to obtain security for the plaintiff's demand. For the purpose of bringing the defendant into court, it is substituted for the ordinary writ or summons; and the seizure of the defendant's property by the attachment stands in the place of personal service, so far as to give jurisdiction to the court to proceed to render judgment in the case. Being the leading process by

which it is sought to compel an appearance, the defendant, upon appearing, may plead in abatement, as if brought into court upon ordinary process. He may traverse and disprove the truth of the cause stated as the ground of attachment. And as it is alone by seizure of his property that the court can acquire jurisdiction of his person, he may show in abatement of the attachment that the property on which the attachment was levied is not his, and therefore that he is not before the court. In this view, the court erred in sustaining the demurrer to the second plea in abatement.

3. The question of title was inquired into to some extent on the issue joined on the first plea in abatement. This, however, does not cure the error in depriving the defendant of the direct issue presented by the second plea.

The proof shows that the slaves attached in this case belonged to the estate of Leonard Basher, deceased, that Mrs. Harris and William Basher were the children and only distributees of said estate; that in the year 1854 Harris and wife filed a bill against S. R. Brown, administrator of the estate and guardian of Mrs. Harris, and also against William Basher, the other distributee, for a settlement and division of the estate; and that during the pendency of said suit an agreement was entered into between the parties, by which it was stipulated that the share of the estate belonging to Mrs. Harris should be settled upon her for her sole and separate benefit; and at the ensuing term of the court, namely, on the fifteenth of December, 1854, a decree founded upon said agreement was entered in said cause, by which, in general terms, Mrs. Harris's "share in the property in controversy" was vested in W. M. Basher, as trustee for her. But neither in the decree nor in the agreement upon which it is based is there any specific description of the amount or kind of property of which said share consisted. It does not appear from the proof that any division of the slaves belonging in common to Mrs. Harris and her brother has ever been made between them; and the idea that the slaves in controversy, or any part of the wife's distributive share of the estate, was reduced into possession by her husband, is excluded by the proof. Upon this state of the facts, the husband had acquired no such interest in the slaves as could be attached by his creditors. It is well settled that until division of the slaves, the husband's marital rights could not attach; and until the husband's marital right is complete by a reduction of the property into possession, or what is equivalent thereto, creditors of the husband cannot lay hold of

the property for the satisfaction of their debts: *Hall v. McLain*, 11 Humph. 425; *Swanson v. Swanson*, 2 Swan, 446-460.

4. The court erred in rendering judgment against the sureties in the replevin bond. The undertaking of the sureties was in the joint behalf of Howell Harris and Nancy Harris, and the discharge of the latter by the voluntary act of the plaintiff operated as a discharge of the sureties from the obligation of their bond.

The judgment will be reversed.

MARRIED WOMAN NOT PERSONALLY LIABLE ON HER CONTRACTS: See *Burton v. Marshall*, 45 Am. Dec. 171, and note collecting prior cases in this series; *Palmer v. Oakley*, 47 Id. 41; *Hollis v. Francois*, 51 Id. 760; *Caldwell v. Walters*, 55 Id. 592, and note on judgments against married women; *Sweeney v. Smith*, 61 Id. 188.

SEPARATE ESTATE OF MARRIED WOMAN, WHEN LIABLE FOR HER CONTRACTS: See *Burch v. Breckinridge*, 63 Am. Dec. 553, and note referring to prior cases; *Sweeney v. Smith*, 61 Id. 188.

HUSBAND'S MARITAL RIGHTS ATTACH UNDER WHAT CIRCUMSTANCES: See note to *Estate of Hinds*, 34 Am. Dec. 545; *Caplinger v. Sullivan*, 37 Id. 575, and note; *Jackson v. McAtiley*, 40 Id. 620; *Benedict v. Montgomery*, 42 Id. 230; *Daniel v. Daniel*, 44 Id. 244.

HUSBAND'S CREDITORS, WHEN MAY PROCEED AGAINST WIFE'S PERSONAL PROPERTY OR CHOSE IN ACTION: See *Hanlon v. Thayer*, 1 Am. Dec. 1; note to *Caplinger v. Sullivan*, 37 Id. 581; *Sale v. Saunders*, 57 Id. 157; and see particularly in regard to legacies and distributive shares of wives in estates, *Robinson v. Woolpper*, 29 Id. 44; *Flory v. Becker*, 45 Id. 610; *Arrington v. Scrubs*, 49 Id. 408.

SURETY'S OBLIGATION EXTINGUISHED BY EXTINCTION OF OBLIGATION OF PRINCIPAL: *Johnson v. Planters' Bank*, 43 Am. Dec. 480. As to the surety's discharge by the dismissal of a suit against the principal, see *Craig v. Cox*, 5 Id. 609; *Bank of Montpelier v. Dixon*, 24 Id. 640.

SEAY v. BANK OF TENNESSEE.

[3 SNEED, 538.]

NOTE WITH PAYEE'S NAME IN BLANK CANNOT BE SO SUED UPON AS A promissory note. The holder must fill up the blank by inserting his own name as payee, so as to show a cause of action in himself, or else an objection by demurrer, or specially upon the trial, will be fatal.

DEBT. The facts are stated in the opinion.

Williams and Carthel, for the plaintiff in error.

M. and H. Brown, for the defendant in error.

By Court, HARRIS, J. The defendant in error brought an action of debt against the plaintiffs in error, in the circuit court of Gibson county, on the following instrument: "Trenton, May 13, 1854. Four months after date I promise to pay to the order of —, two thousand two hundred and fifty dollars — cents, at the branch of the Bank of Tennessee, at Trenton. Value received. L. P. Seay."

Upon the back of which are indorsed the following names: "D. M. Boon, M. M. Seay, G. M. Sharp, J. A. W. Hess, and James Ham." The necessity of protest is waived by all the indorsers. The declaration avers that by said note, L. P. Seay (the maker) "promised four months after date to pay — two thousand two hundred and fifty dollars," etc. The defendant cravedoyer of the note and indorsements, which were set out, and they demurred. The demurrer was disallowed by the court, and upon the plea of *nil debet* there was verdict and judgment for the plaintiff, and the defendants have prosecuted a writ of error to this court. The only error assigned and relied on here is that the paper declared on is not a promissory note, and that the court erred in overruling the demurrer.

It is well settled that a note issued in blank for the payee's name may be filled up at any time, even at the trial, "by any *bona fide* holder with his own name as payee, and then it will be treated as a good promissory note to him from its date:" Story on Prom. Notes, sec. 37; Ch. Bills, 182, 183, 160-173; *Crutchly v. Mann*, 5 Taunt. 529. The correctness of this principle is admitted by the counsel for the plaintiffs in error, but they insist that as the plaintiff below omitted to exercise the right by inserting the name of a payee in the note, but declared upon it and described it as payable to blank, she has failed to show a right of action in herself; that it is essential to the validity of a promissory note that there should be a payee named in the note. Mr. Story, in his work on promissory notes, sec. 33, lays down the rule "that it is essential to the validity of a promissory note that it should contain no contingency or uncertainty as to the person by whom it is payable, or to whom it is payable. The name of the particular person to whom it is payable should be given," etc.

In the case of *Hubbard v. Williamson*, 4 Ired. L. 266, where the plaintiff brought a joint action against Williamson as first indorser and Roan as second indorser, it appeared upon the trial that the indorsement from Williamson to Roan, and the indorsement from Roan to the plaintiff, were in blank. Upon objection

by the defendants, the court held that the plaintiffs could not recover in this action without filling up the indorsements, so as to show on the bill a title to it in the plaintiffs. The plaintiffs insisted that they were entitled to recover without filling up the indorsements, declined to do so, and in submission to the opinion of the court suffered a nonsuit, and appealed to the supreme court, where the judgment was affirmed.

This authority was referred to by this court in the case of *Gardner v. Bank of Tennessee*, 1 Swan, 425; and after showing the distinction between this authority and the case then before the court, Judge Totten says: "This [the case in Iredell] is not inconsistent with our judgment in the present case."

From these authorities, as well as upon general principles, we think it clear that the plaintiff in the declaration in this case has failed to show a cause of action for want of a payee in the note, and that the demurrer of the defendants in the court below should have been sustained. The ground relied upon here by the defendant in error, that as the bank had the right to fill up the blanks it should be regarded as though they had been filled up, we think cannot be sustained upon authority. This point is involved in the case of *Hubbard v. Williamson*, above referred to, and decided the other way.

In the case decided by the supreme court of New York, of the *United States v. White*, 2 Hill (N. Y.), 61 [37 Am. Dec. 374], the note sued on, upon its face, was made payable "to the order of the indorser's name;" the note was indorsed by Samuel Adams, and it was held to be payable to Adams the same as if he had been designated by name. We do not think this authority conflicts with our opinion in this case.

The act of 1852, section 4, to which we have been referred, in our judgment does not apply to this case. The objections here are not formal, but substantial. We do not intend to be understood by this decision as holding that where the indorsements are in blank and there is no demurrer to the declaration, nor the objections specifically made on the trial in the court below, that such an objection could be taken here; or that it is indispensable to fill up the blank indorsements; upon that question we give no opinion. But we hold that a note, where the name of the payee is in blank, and so sued upon, is not a valid promissory note; and that upon objection, taken either by demurrer or specially upon the trial, such objection would be fatal unless the party filled up the blank so as to show a cause of action in himself.

The judgment of the circuit court will be reversed and the demurrer sustained; but the cause will be remanded to the circuit court for further proceedings.

NOTE WITH PAYEE'S NAME IN BLANK MAY BE FILLED UP BY ANY BONA FIDE HOLDER: *United States v. White*, 37 Am. Dec. 376; note to *Titte v. Thomas*, 64 Id. 156.

MOREAU v. SAFFARANS.

[3 SHEED, 506.]

CONVEYANCE TO "J. L. S. & Co." OPERATES TO INVEST J. L. S., INDIVIDUALLY, WITH ENTIRE LEGAL TITLE to real estate purchased with partnership funds for the use of the partnership, but in equity he will be treated as holding the legal title in trust for the benefit of the partnership.

DECREE CONCERNING REAL ESTATE, HELD BY ONE PARTNER AS TRUSTEE FOR FIRM, WILL NOT BE SET ASIDE as irregular and void because the other partners were not made parties; but such decree operates upon the trustee alone, and will be modified, if otherwise, to that effect.

MULTIFARIOUSNESS CANNOT BE ASSIGNED FOR ERROR, under the Tennessee act of 1852, c. 365, sec. 7, unless the objection is first made by demurrer to the bill, taken at the proper time.

OBJECTION TO JURISDICTION OF COURT OF CHANCERY OF TENNESSEE IS WAIVED, under the Tennessee act of 1852, c. 365, sec. 9, if, without demurrer, an answer is put in; and the same is true if a defendant, being regularly served with process, neglects to appear, and judgment *pro confesso* is entered up against him.

WRIT OF ERROR CANNOT BE PROSECUTED by persons who are not parties upon the record; and not being parties, cannot be affected by the decree.

BILL in chancery. The opinion states the facts.

R. K. Turnage, for the complainants.

J. B. Thornton, for the defendants.

By Court, McKINNEY, J. This bill was brought to redeem a lot of ground in the city of Memphis. The chancellor decreed for the complainants, and the case is brought here on a writ of error.

The lot was sold at execution sale, on the seventh of July, 1851, and was purchased by one Whitsitt, at the price of eight dollars.

Whitsitt transferred his interest to "John L. Saffarans & Co.," and in writing directed the sheriff to make a deed accordingly.

Within two years from the sale a tender of the redemption

money was regularly made to John L. Saffarans, who refused to receive the same for the reason, as he alleged, that there was no one entitled to redeem said lot; therefore this bill was filed, and the redemption money deposited in court.

The defendants to the bill are Whitsitt and "John L. Saffarans & Co." But neither in the bill nor in any proceeding in the cause are the names of the other persons constituting the alleged firm of "John L. Saffarans & Co." stated; nor, indeed, is it shown in the record that any such firm really existed, or that any person whatever was associated with John L. Saffarans in business generally, or in this particular transaction. The subpoena to answer is against the firm; and the sheriff's return thereon is, "Executed on J. L. Saffarans—company not found." Neither Whitsitt nor Saffarans, both of whom resided in Memphis, where the bill was filed, answered the bill, and judgment *pro confesso* was regularly entered up against both. The former died during the progress of the suit. The proof shows that "Saffarans & Co." took possession of the lot in 1851, and that seventy-five dollars per year would be a reasonable rent; also that the building and improvements on the lot were worth about three hundred dollars, all of which were torn down and destroyed; and that the soil and earth to the depth of five or six feet were dug and taken away, to fulfill a contract that "Saffarans & Co." had for filling up the navy-yard at Memphis, the value of which is fixed at two hundred dollars. An account was ordered, embracing all the foregoing items, making an aggregate of seven hundred and sixty-eight dollars and twenty-five cents, as reported by the master. John L. Saffarans refused to obey the summons of the master, requiring him to be present at the taking of the account. The report of the master, not being excepted to, was confirmed; and a final decree rendered against "John L. Saffarans & Co.," for the amount stated, with interest from the date of the report and costs of suit.

To reverse this decree, John L. Saffarans and four other persons, who, in their petition for a writ of error, state "that they are, and have been for several years past, partners in business in the city of Memphis, under the firm name and style of "John L. Saffarans & Co.," have joined in prosecuting a writ of error.

It is insisted here, for the so-called plaintiff in error, that the entire proceedings and decree in the cause are irregular and void, on the ground that the several persons composing the firm, except John L. Saffarans, were not parties to said proceedings and decree.

The proceedings in this case, as exhibited in the record, are certainly anomalous, but we will proceed to inquire whether any of the parties to this writ of error can be heard to complain of them in the mode here attempted.

It is to be observed that the question upon which this case depends involves the consideration of the principles of law applicable to the peculiar relation of partners in respect to real estate. Upon general principles, it would seem that real estate purchased by partners with the partnership funds, and for the use or benefit of the partnership, is to be regarded, in respect to the legal title, as an estate held by them as tenants in common, but subject to a trust, implied from the relation of the parties and nature of the case, for the benefit of the partnership, until the partnership accounts are settled and the partnership debts are paid. Usually, and properly, the conveyance is to the partners, as tenants in common, by name. Real and personal property, in this respect, stand upon different grounds. By positive law, the legal title to the real property can pass to the purchaser only by conveyance. And at law, the question in whom the legal title is must be determined by the import and legal effect of the instrument of conveyance. If this principle be correct, it follows that a conveyance to "J. L. Saffarans & Co." would operate to invest John L. Saffarans, individually, with the entire legal title. But it is clear that in equity he would be treated as holding the legal title in trust, for the benefit of the partnership. The rule at law is, that the legal title is in the individual partner to whom, by name, the conveyance is made. The several members composing the firm cannot be regarded, in the view of a court of law, as holding real estate as tenants in common, unless it be conveyed to them, as such, by name; and on the other hand, each partner is required to join in the conveyance of real estate in order to pass the entirety thereof to the purchaser. If one partner only executes the conveyance, whether it be in his own name or in that of the firm, the deed will not, generally speaking, pass anything more than his own interest: Story on Part., secs. 92, 94; Collyer on Part., secs. 135 et seq.; *Dudley v. Littlefield*, 21 Me. 418. But in the view of a court of equity, it is unimportant in whose name the purchase may have been made, or the conveyance taken, whether in the name of one of the firm, or even in the name of a stranger; if purchased, in fact, with partnership funds, and for partnership purposes, it will be treated in equity as belonging to the firm.

It results, therefore, from the application of these principles, that the legal title to the lot in question was vested in John L. Saffarans, as trustee for the benefit of the firm, if, in fact, any such firm existed. And it is certainly true that the correct practice would have been to have made the other partners parties, and this might have been required if the objection had been made at the proper time and in the proper form; but that is not now the question. The point to be decided is whether or not the omission of the other supposed partners constitutes any sufficient ground, in view of all the facts of this particular case, for setting aside the proceedings as irregular and void. We think not. J. L. Saffarans, in whom the legal title was vested as trustee and representative of the firm, was regularly before the court. He refused to appear, or answer, or have anything to do with the defense of the suit. He cannot, therefore, complain; so far as he is individually concerned, the title is properly divested out of him and restored to the complainants; nor is it for him to complain in behalf of his alleged copartners. True, the decree will necessarily operate upon him alone when it ought—upon the assumption that there are other partners—to have been against all the members of the firm; but this is the unavoidable and legitimate result of his own voluntary refusal to avail himself of his day in court when this and other objections were open to him, and might have been successfully urged.

But it is said the bill is multifarious, and that the decree is erroneous in allowing for the destruction of buildings, and for the value of the soil and earth removed and sold.

The defendant J. L. Saffarans, in the existing state of our law, cannot assign this for error. By the act of 1852, c. 365, sec. 7, multifariousness cannot be assigned for error, unless the objection was first made by demurrer taken at the proper time. And by the ninth section of the same act, if, without demurrer, an answer be put in, it amounts to a waiver of all objections to the jurisdiction of the court, even though the matter complained of be matter of legal jurisdiction; and the chancellor is required to decree relief according to law, and forbidden to dismiss the bill. Under this provision, an objection to the jurisdiction, of the nature of the one before us in the present case, must be taken by demurrer; and if waived by submitting to answer, the objection cannot be set up in any other mode. Such is the state of the law where the party appears and makes defense; and if, being regularly served with process, he neglect to appear, and judgment *pro confesso* is entered up against him,

he is in no better condition. In the latter case, as much as in the former, he has neglected to avail himself of the objection in the only mode in which advantage can be taken of it. The judgment *pro confesso* stands in the place of an answer, admitting the facts charged in the bill, without objection to the jurisdiction of the court. Hence the defendant is precluded in this court from relying on this as a ground for reversing the decree.

In the next place, the other persons who have joined in the prosecution of this writ of error cannot be heard in this court. First, upon the uniform rule that, not being parties upon the record, they cannot appeal or bring a writ of error. And again, because, not being parties, they are not, and cannot in contemplation of law possibly be, affected by the decree. They have nothing to complain of, admitting them to be parties with Saffarans, the defendant, for upon that assumption they are relieved from a burden which ought to have fallen equally upon all the members, but which by the decree is cast upon John L. Saffarans alone.

The general rule is admitted, that all persons having an interest, either legal or equitable, in the subject-matter of the suit must be made parties. But no one of the plaintiffs in error is in a condition to insist upon a violation of this rule in the present case. And as the person vested with the entirety of the legal title to the lot in question was properly before the court, this is sufficient—upon the state of the case as presented in the record—to sustain the decree for redemption; and the decree for rent and damages is equally well sustained against John L. Saffarans.

The decree, however, will be corrected in form, so as to make it a decree against John L. Saffarans personally and alone, and with this modification it will be affirmed.

LAND PURCHASED BY PARTNERSHIP, WHETHER HELD IN JOINT TENANCY OR TENANCY IN COMMON: See *Baker v. Wheeler*, 24 Am. Dec. 66; *Baca v. Ramos*, 29 Id. 463; *Baird v. Baird's Heirs*, 31 Id. 399, and note; *Buchan v. Sumner*, 47 Id. 305; *Cummings's Appeal*, 64 Id. 695. Real estate held by a partnership cannot be alienated by one of the partners without a breach of trust, unless made to one who had no notice, actual or constructive, of such trust: *Dyer v. Clark*, 39 Id. 697.

THE PRINCIPAL CASE IS CITED IN *Linch v. Linch*, 1 Lea, 528, to the point that the general rule is that only parties upon the record can appeal or bring a writ of error; and in *Beecher v. Hicks*, 7 Id. 210, to the point that perhaps living grantees under a deed expressly providing for after-born children would hold the legal title in trust for themselves and children.

FOX v. SANDFORD.

[4 SEER, 36.]

MASTER IS NOT LIABLE FOR INJURY DONE BY ONE SERVANT TO ANOTHER, engaged in a common employment, through negligence or unskillfulness.

ACTION for damages. The facts are stated in the opinion.

T. C. Lyon, for the plaintiff.

O. P. Temple and J. B. Heiskell, for Shepperd, Leeds, & Hoyt.

J. R. Cocke, for Sandford

By Court, CARUTHERS, J. This was an action brought by Fox to recover damages against Shepperd, Leeds, & Hoyt, the undertakers, and Sandford, his co-employee, for an injury sustained by the plaintiff from the negligence and unskillfulness of defendant Sandford. The verdict was in favor of the defendants Shepperd, Leeds, & Hoyt, and against Sandford for one thousand dollars damages. The plaintiff moved for a new trial as to Shepperd, Leeds, & Hoyt, and the defendant Sandford asked a new trial as to the finding against him. Both appeal in error from the judgment overruling their respective motions.

Shepperd, Leeds, & Hoyt were general undertakers of a building, and both Sandford and Fox were workmen employed by them. For the purpose of elevating some large timbers to the top of the wall, the latter was posted on the building, and the former managed a machine called a derrick, on the ground. By the reckless management of the derrick, as it is alleged, Fox was precipitated with the timber to the ground, and received the serious injury of which he complains. The proof shows that the guy-rope was loosened by Sandford after the timber was partly up, against the warning of Fox, and by that the accident was produced. The inquiry for the jury was, whether in this there was a want of proper skill and care, necessary for the safety of those on the top of the wall. If there was no unskillfulness or negligence, it would be a case of inevitable accident, and the injury without remedy; but if it were otherwise, the defendant Sandford, at least, would be liable. This was the effect of the charge on that point; and the finding of the jury, there having been proof to sustain it, must be conclusive as to the case of Sandford.

But the other branch of the case presents more difficulty. It is true, as argued, that the authorities are not entirely harmoni-

ous upon the question of the master's or employer's liability for injury done by one of his servants to another by a want of skill or negligence in the business of their employment. Upon this point the court charged "that if it appeared in evidence that Fox and Sandford were in the employment of Shepperd, Leeds, & Hoyt, engaged in a common employment, and the injury to the plaintiff was occasioned by the neglect or unskillfulness of the defendant Sandford, yet under the weight of authority, English and American, the court felt constrained, and so instructed the jury, that the defendants Shepperd, Leeds, & Hoyt could not be held liable in damages for such neglect or unskillfulness on the part of their co-defendant, Sandford;" but they could be for any neglect of their own; "but were not responsible for the condition of the derrick on the morning the accident happened."

We are brought to the same conclusion in relation to the weight of authority, as well as the reason of the rule applied to the facts of the case before us: Story on Agency, sec. 453, and notes; 2 Kent's Com. 281, top page, and notes; *Priestly v. Fowler*, 3 Mee. & W. 1. The reasoning by which this position is maintained need not here be reiterated, as it will be found in the cases referred to, and others there cited.

It will be observed that the facts of this case do not raise the question of liability of the employer for want of due care in the selection of his servants, or making proper provisions for their safety. Such a case might fall under a very different rule.

In this case we think there is no error against the appellants in either case by which they could have been injured, in view of the facts in this case, and therefore affirm the judgment.

WHO ARE FELLOW-SERVANTS IN COMMON EMPLOYMENT.—The general rule of the employer's liability is stated in the note to *Murray v. S. C. R. R.*, 36 Am. Dec. 279, and the origin and history of the rule is there discussed at length; and while there is very little conflict of authority as to the rule, the great difficulty that courts have experienced in the practical application of it to particular facts and circumstances has led to a great diversity of opinion and to decisions in the courts of different states totally irreconcilable. The impossibility of laying down any uniform rule which can be applied to all the varying circumstances and conditions of the business world is confessed by all the judges who have been called upon to pass on the question, and this very difficulty has led the courts of some states to consider all who are employed by the same master in the same general business, without respect to the nature of the employment, as fellow-employees, and to apply the rule with great rigor, and to allow of no exception. This is notably so in the English decisions, and in nearly all of the cases in the older states: See *Priestly v. Fowler*, 3 Mee. & W. 1; *Farwell v. Boston etc. R. R.*, 4 Met. 49; *S. C.*, 38

Am. Dec. 339; *Lawell v. Howell*, L. R. 1 C. P. Div. 161; S. C., 45 L. J. C. P. 387; *Waller v. South Eastern R'y*, 2 Hurl. & C. 102; *Conway v. Belfast etc. R'y*, I. R. 9 C. L. 498. On the other hand, in the progress of society and general extension and diversification of business carried on by the same employer, it has been found that the rule often works injustice and hardship, and the tendency of the modern authorities appears to be in the direction of such a modification as shall eventually devolve upon the employer a just share of the responsibility for the safety of his employees. While in many of the states the rule has become firmly ingrafted on their respective systems, still we find a constant tendency to make exceptions and lessen the harshness of the application of the rule to cases where manifest justness demands an abatement of its rigor. And without attempting to give a definition of the term "fellow-employees," under the rule, it will be sufficient to say that the tendency of the later decisions is to regard only those who, in the performance of their respective duties, are so connected or brought into co-operation that the performance of their respective duties will ordinarily bring them into such situations as to expose them to the risk of injury from the negligence or carelessness of each other—an actual co-operation to accomplish some particular result, a consociation in their ordinary duties: See *Chicago etc. R. R. v. Moranda*, 93 Ill. 302; S. C., 34 Am. Rep. 168; *Holton v. Daly*, 4 Ill. App. 25; *Gillenwater v. Madison etc. R. R.*, 5 Ind. 339; S. C., 61 Am. Dec. 101; *Louisville etc. R. R. v. Collins*, 2 Duv. 114; *O'Donnell v. Allegheny etc. R. R.*, 59 Pa. St. 239; *Davis v. Central Vermont R. R.*, 55 Vt. 84; S. C., 45 Am. Rep. 590; *Ford v. Fitchburg R. R.*, 110 Mass. 240; S. C., 14 Am. Rep. 598; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Brown v. Central Pacific R. R.*, 6 West Coast Rep. 797 (Cal.).

THE GENERAL RULE that an employer is not liable to those in his employ for injuries resulting to them from the negligence or misconduct of fellow-employees engaged in the same common service or employment is well settled. The employer is not liable except where the injury can be traced to the employer himself, either in employing incompetent servants or in retaining incompetent servants after notice, or from defective machinery or insufficient materials. In addition to the cases cited in the note to *Murray v. S. C. R. R.*, 36 Am. Dec. 268, the following recent decisions sustain the rule: *Lovegrove v. London etc. R'y*, 16 C. B., N. S., 669; *Gallagher v. Piper*, Id.; *Conway v. Belfast etc. R'y*, I. R. 9 C. L. 498; *Bull v. Mobile etc. R. R.*, 67 Ala. 206; *Mobile etc. R'y v. Smith*, 59 Id. 245; *Lopez v. Central Arizona M. Co.*, 1 West Coast Rep. 41 (Ariz); *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20; *Colorado etc. R. R. v. Ogden*, 3 Col. 499; *Shields v. Yonge*, 15 Ga. 349; S. C., 60 Am. Dec. 698; *Illinois etc. R. R. v. Cox*, 21 Ill. 20; *Chicago etc. R. R. v. Kerfe*, 47 Id. 108; *Columbus etc. R'y v. Troesch*, 68 Id. 545; S. C., 18 Am. Rep. 578; *Ohio etc. R. R. v. Tindall*, 13 Ind. 366; *Wilson v. Madison etc. R. R.*, 18 Id. 226; *Gormley v. Ohio etc. R'y*, 72 Id. 31; *Ohio etc. R'y v. Collarn*, 73 Id. 261; S. C., 38 Am. Rep. 134; *Robertson v. Terre Haute etc. R. R.*, 78 Ind. 77; S. C., 41 Am. Rep. 552; *Helfrich v. Williams*, 84 Ind. 553; *Louisville etc. R. R. v. Collins*, 2 Duv. 114; *Hubgh v. N. O. & C. R. R.*, 6 La. Ann. 495; S. C., 54 Am. Dec. 565; *Satterly v. Morgan*, 35 La. Ann. 1166; *Osborne v. Knox etc. R. R.*, 68 Me. 49; *Blake v. Maine Central R. R.*, 70 Id. 60; S. C., 35 Am. Rep. 297; *O'Connell v. Baltimore etc. R. R.*, 20 Md. 212; *Shauck v. Northern etc. R'y*, 25 Id. 462; *Cumberland Coal etc. Co. v. Scally*, 27 Id. 589; *Hanrathy v. Northern etc. R'y*, 46 Id. 280; *Pennsylvania R. R. v. Wachter*, 60 Id. 395; *Kelley v. Norcross*, 121 Mass. 508; *Harkins v. Standard Sugar Refinery*, 122 Id. 400; *Colton v. Richards*, 123 Id. 484; *Kelley v. Boston Lead Co.*,

128 Id. 456; *Curran v. Merchants' Mfg. Co.*, 130 Id. 374; S. C., 39 Am. Rep. 457; *McDermott v. City of Boston*, 133 Mass. 349; *Flynn v. City of Salem*, 134 Id. 351; *Floyd v. Sugden*, Id. 563; *Day v. Toledo etc. Ry.*, 42 Mich. 523; *Smith v. Flint etc. Ry.*, 46 Id. 258; S. C., 41 Am. Rep. 161; *Greenwald v. Marquette etc. R. R.*, 49 Mich. 197; *Brown v. Winona etc. R. R.*, 27 Minn. 162; S. C., 38 Am. Rep. 285; *Collins v. St. Paul etc. R. R.*, 30 Minn. 31; *Brown v. Minneapolis etc. Ry.*, 31 Id. 553; *Chicago etc. R. R. v. Doyle*, 60 Miss. 977; *Brothers v. Cartter*, 52 Mo. 372; S. C., 14 Am. Rep. 424; *Conner v. Chicago etc. R. R.*, 59 Mo. 285; *McAndrews v. Burns*, 39 N. J. L. 117; *Sherman v. Rochester etc. R. R.*, 17 N. Y. 153; *Laning v. N. Y. Cent. R. R.*, 49 Id. 521; S. C., 10 Am. Rep. 417; *Crispin v. Babbitt*, 81 N. Y. 516; S. C., 37 Am. Rep. 521; *McCosker v. Long Island R. R.*, 84 N. Y. 77; *Harvey v. N. Y. Cent. etc. R. R.*, 88 Id. 481; *Young v. N. Y. etc. R. R.*, 30 Barb. 229; *Marvin v. Muller*, 25 Hun. 163; *Cowles v. Richmond etc. R. R.*, 84 N. C. 309; S. C., 37 Am. Rep. 620; *Columbus etc. R. R. v. Webb*, 12 Ohio St. 475; *Pittsburg etc. Ry. v. Devinney*, 17 Id. 197; *Lake Shore etc. Ry. v. Knittal*, 33 Id. 468; *Railway Co. v. Ranney*, 37 Id. 665; *Willis v. Oregon etc. R. R.*, 3 West Coast Rep. 240 (Or.); *Weger v. Pennsylvania R. R.*, 55 Pa. St. 460; *Lehigh Valley Coal Co. v. Jones*, 86 Id. 432; S. C., 6 Rep. 125; 17 Alb. L. J. 513; *Delaware etc. Canal Co. v. Carroll*, 89 Pa. St. 374; *Keystone Bridge Co. v. Newberry*, 96 Id. 246; S. C., 42 Am. Rep. 543; *Mann v. Oriental Print Works*, 11 R. I. 152; *Lasure v. Graniteville Mfg. Co.*, 18 S. C. 275; *Gunter v. Graniteville Mfg. Co.*, Id. 262; S. C., 44 Am. Rep. 573; *Ragdale v. Memphis etc. R. R.*, 3 Baxt. 426; *Nashville etc. R. R. v. Wheelers*, 10 Lea, 741; S. C., 43 Am. Rep. 317; *Houston etc. R. R. v. Myers*, 55 Tex. 110; *Texas Mexican Ry. v. Whitmore*, 58 Id. 276; *Davis v. Central Vermont R. R.*, 55 Vt. 84; S. C., 45 Am. Rep. 590; *Brabbits v. Chicago etc. Ry.*, 38 Wis. 289; *Naylor v. Chicago etc. Ry.*, 53 Id. 661; *Howland v. Milwaukee etc. Ry.*, 54 Id. 226; *Hoth v. Peters*, 53 Id. 405; *Whitnam v. Wisconsin etc. R. R.*, 58 Id. 406; *Heine v. Chicago etc. Ry.*, Id. 525; *Hough v. Railway Co.*, 100 U. S. 213; *Halverson v. Nisen*, 3 Saw. 562; *Melville v. Missouri River etc. R. R.*, 4 McCrary, 194; *Yager v. Atlantic etc. R. R.*, 4 Hughes, 192; *Jordan v. Wells*, 3 Woods, 527; *Thompson v. Chicago etc. Ry.*, 18 Fed. Rep. 239; *Craw v. St. Louis etc. Ry.*, 20 Id. 87.

SERVANT INTRUSTED WITH FULL CONTROL AND MANAGEMENT, OR WITH DUTIES MASTER IS HIMSELF BOUND TO PERFORM.—If an employer commits the entire charge of business to an employee, with power to choose his own assistants and to control and discharge them at pleasure, or intrusts the employee with the performance of duties which the employer himself is bound to perform, as in the preparation of materials or the construction of machinery, the employee is not a fellow-servant with those into whose hands the mere manual execution of the business is intrusted, and the employer is, therefore, liable for the negligence of such an employee, he being the representative of the master. These propositions are fully established by the cases in the note to *Murray v. S. C. R. R.*, 36 Am. Dec. 289; and in addition thereto, see the following: *Tyson v. South & North Alabama R. R.*, 61 Ala. 554; *Fones v. Phillips*, 39 Ark. 17; *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20; *Colorado Central R. R. v. Ogden*, 3 Col. 499; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; S. C., 47 Am. Rep. 653; *Mitchell v. Robinson*, 80 Ind. 281; S. C., 41 Am. Rep. 812; *Chicago etc. Ry. v. May*, 108 Ill. 288; *Kansas Pacific Ry. v. Little*, 19 Kan. 267; S. C., 6 Rep. 199; 6 Cent. L. J. 60; *Hannibal etc. R. R. v. Fox*, 31 Kan. 586; *Chicago etc. Ry. v. Bayfield*, 37 Mich. 205; *Quincy Min. Co. v. Kitts*, 42 Id. 34; *Ryan v. Bagaley*, 50 Id. 179; S. C., 45 Am. Rep. 35; *Brothers v. Cartter*, 52 Mo. 372; S. C., 14 Am. Rep. 424; *Gormley v. Vul-*

can Iron Works, 61 Mo. 492; *Whalen v. Centenary Church*, 62 Id. 326; *Cook v. Hannibal etc. R. R.*, 63 Id. 397; *Hall v. Missouri Pacific R'y*, 74 Id. 298; *Lydon v. Manton*, 3 Mo. App. 602; *Devany v. Vulcan Iron Works*, 4 Id. 236; *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. Rep. 369; *Booth v. Boston etc. R. R.*, 73 N. Y. 38; *Sheehan v. N. Y. Cent. R. R.*, 91 Id. 332; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Eagan v. Tucker*, 18 Hun, 347; *Henry v. Brady*, 9 Daly, 142; *Washburn v. Nashville etc. R. R.*, 3 Head, 638. But if the employee is negligent in performing work as a co-laborer with those under his control, which had no relation to his position as representative of his master, he would be a fellow-servant with those under him: *Chicago etc. R'y v. May*, 108 Ill. 288; *Hoke v. St. Louis etc. R'y*, 11 Mo. App. 574; as a superintendent of the road department of a railroad assuming to act as a mere "boss" or "foreman of a gang:" *Hoke v. St. Louis etc. R'y*, *supra*.

SUPERIOR AND INFERIOR SERVANTS.—Aside from the case where full control and management is intrusted to a superintendent or other employee by the employer, so that the employee represents to all intents and purposes the employer, we have the case where lesser powers and authority are conferred upon an employee. The English decisions, and a large number of American cases, maintain the doctrine that where the negligent servant is a superior and the injured servant an inferior, they are fellow-servants in a common employment, and the master is not liable, provided they are engaged in a common enterprise, with duties tending to the same general object or end; as, the head engineer and third engineer on a vessel: *Searle v. Lindsay*, 11 C. B., N. S., 429; S. C., 8 Jur., N. S., 746; 31 L. J. C. P. 106; 10 Week. Rep. 89; 5 L. T., N. S., 427; the general traffic manager of a railroad and a "milesman:" *Conway v. Belfast etc. R'y*, 1 R. 9 C. L. 498; the manager of a gas company and the workmen employed about the premises: *Allen v. New Gas Co.*, L. R. 1 Exch. Div. 251; the foreman of locomotive-works and the men employed under him: *Feltham v. England*, L. R. 2 Q. B. 33; a sub-foreman in a coal mine in charge of a particular portion of the mine and the miners: *Wilson v. Merry*, L. R. 1 H. L. Sc. App. 326; the manager of a mine and the miners: *Howell v. Landove Siemens Steel Co.*, L. R. 10 Q. B. 62; the foremen of a mine and the miners: *McLean v. Blue Point M. Co.*, 51 Cal. 255; *Peterson v. Whitebreast Coal etc. Co.*, 50 Iowa, 673; S. C., 32 Am. Rep. 143; the foreman in building scaffolding and the workmen under him: *Gallagher v. Piper*, 16 C. B., N. S., 669; the foreman of a gang of men employed as track or section men and the men under him: *Chicago etc. R'y v. Simmons*, 11 Ill. App. 147; *Houser v. Chicago etc. R'y*, 60 Iowa, 230; S. C., 46 Am. Rep. 65; *Lawler v. Androscoggin R. R.*, 62 Me. 463; S. C., 16 Am. Rep. 492; *Cumberland Coal etc. Co. v. Scally*, 27 Md. 589; *Daubert v. Pickel*, 4 Mo. App. 591; *Malone v. Hathaway*, 64 N. Y. 5; S. C., 21 Am. Rep. 573; *Barring v. Delaware etc. Canal Co.*, 19 Hun, 216; *Weger v. Pennsylvania R. R.*, 55 Pa. St. 460; *Keystone Bridge Co. v. Newberry*, 96 Id. 260; S. C., 42 Am. Rep. 543; the conductor and brakeman on the same train, or in the employ of the same company: *Thayer v. St. Louis etc. R. R.*, 22 Ind. 26; *Sherman v. Rochester etc. R. R.*, 17 N. Y. 153; *Whitman v. Wisconsin etc. R. R.*, 58 Wis. 408; *Chicago etc. R'y v. Doyle*, 60 Miss. 977; *Conner v. Chicago etc. R'y*, 59 Mo. 285; *Day v. Toledo etc. R'y*, 42 Mich. 523; the conductor in charge of a gravel train and the laborers on the train: *Ryan v. Cumberland Valley etc. R. R.*, 23 Pa. St. 384; *Naylor v. Chicago etc. R'y*, 53 Wis. 661; *Howland v. Milwaukee etc. R'y*, 54 Id. 226; *Heine v. Chicago etc. R'y*, 58 Id. 525; *O'Connell v. Baltimore etc. R. R.*, 20 Md. 212; the train dispatcher and the brakemen and engineers on the trains of the company: *Robertson v. Terre*

Haute etc. R. R., 78 Ind. 77; S. C., 41 Am. Rep. 552; *Blessing v. St. Louis etc. R'y*, 79 Mo. 410; the material-man and train dispatcher, having authority to hire and discharge men and direct the movements of trains, and an ordinary track laborer: *McKune v. Cal. Southern R. R.*, 5 West Coast Rep. 159 (Cal.); the superintendent and operatives in a factory: *Albro v. Agawam Canal Co.*, 6 Cush. 75; the foreman of laborers working on the street of a city and the laborers under him: *McDermott v. City of Boston*, 133 Mass. 349; *Flynn v. City of Salem*, 134 Id. 351; the "sectionman" and one employed to load wood on the tender: *Foster v. Minnesota etc. R. R.*, 14 Minn. 360; the overseer, or roadmaster, and a "sectionman" under him: *Brown v. Winona etc. R. R.*, 27 Id. 162; S. C., 38 Am. Rep. 285; the roadmaster and an engineer: *Walker v. Boston etc. R. R.*, 128 Mass. 8; the yardmaster and one whose duty it is to make up trains: *McCosker v. Long Island R. R.*, 84 N. Y. 77; the foreman who erected scaffolding and a hod-carrier: *Green v. Ranta*, 48 N. Y. Super. Ct. 156; the foreman of a dock company engaged in superintending the raising of a vessel and the men under him: *Hart v. N. Y. Floating Dry Dock Co.*, Id. 480; the person placed in special charge of a wrecking-train and the crew: *Beilfus v. New York etc. R'y*, 29 Hun, 556; the mate and seamen of a ship: *Olson v. Clyde*, 32 Id. 425; *Halverson v. Nisen*, 3 Saw. 562; the foreman of a gang of laborers, engaged in erecting a shed under the direction of a supervisor, and the laborers: *Willis v. Oregon R'y etc. Co.*, 3 West Coast Rep. 240; the "mining-boss" and "driver-boss": *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; S. C., 6 Rep. 125; 17 Alb. L. J. 513; the "mining-boss" and the miners: *Delaware etc. Canal Co. v. Carroll*, 89 Pa. St. 374; the foreman bridge-builder and a journeyman bridge-builder and carpenter working under him: *Yager v. Atlantic etc. R'y*, 4 Hughes, 192; the millwright and a carpenter under him: *National Tube Works v. Bedell*, 96 Pa. St. 175; the foreman in operation of a pile-driver and the laborers: *Schultz v. Chicago etc. R'y*, 48 Wis. 375; the foreman of a lumber-yard and laborers: *Hoth v. Peters*, 55 Id. 405; the engineer of a steam shovel and the laborers engaged with the machine: *Thompson v. Chicago etc. R'y*, 18 Fed. Rep. 239.

On the other hand, a number of recent American cases have shown a disposition to depart from this rule. "No service is common that does not admit of a common participation, and no servants are fellow-servants when one is placed in control over the other:" *Cleveland etc. R. R. v. Keary*, 3 Ohio St. 201; *Graville v. Minneapolis etc. R'y*, 3 McCrary, 352; *Nashville etc. R. R. v. Wheelless*, 10 Lea, 741; S. C., 43 Am. Rep. 317. Thus it has been held that the conductor of a train is not a fellow-servant in a common employment with the rest of the men on the train, over whom he has control and authority: *Chicago etc. R'y v. Ross*, 112 U. S. 377; *Ross v. Chicago etc. R'y*, 2 McCrary, 235; *Little Miami R. R. v. Stevens*, 20 Ohio, 415; *Moon's Adm'r v. Richmond etc. R. R.*, 78 Va. 745; S. C., 49 Am. Rep. 401; *Dobbin v. Richmond etc. R. R.*, 81 N. C. 446; S. C., 31 Am. Rep. 512; *Chicago etc. R'y v. Swanson*, 16 Neb. 254; S. C., 49 Am. Rep. 718; *Chicago etc. R'y v. Bayfield*, 37 Mich. 205; the foreman in charge of repairing cars and the workmen under him: *Lake Shore etc. R'y v. Lavalley*, 36 Ohio St. 221; the yard-master in charge of cars in the yard and the yardmen employed about the cars: *Stoddard v. St. Louis etc. R. R.*, 65 Mo. 514; the engineer and a fireman, where by the rules of the company the engineer is placed in superior authority: *Mann v. Oriental Point Works*, 11 R. I. 152; *Nashville etc. R. R. v. Jones*, 9 Heisk. 27; the "section-boss," or foreman, having full authority to order a gang of track laborers about: *Miller v. Union Pacific R'y*, 17 Fed. Rep. 67; *Louisville etc. R. R. v.*

Bowler, 9 Heisk. 866; the foreman in charge of a distinct piece of work in an extensive foundry, and having control of the laborers and the labor: *Douling v. Allen*, 74 Mo. 13; S. C., 41 Am. Rep. 298; the master of a steam-vessel and a fireman: *The Clatsop Chief*, 7 Saw. 274; the mate and deck-hand of a vessel: *Daub v. Northern Pacific R. R.*, 18 Fed. Rep. 625; and the general superintendent, or foreman in full charge of the road, is not a fellow-servant with the conductors: *Patterson v. Pittsburgh etc. R. R.*, 76 Pa. St. 389; S. C., 18 Am. Rep. 412.

APPLICATION TO PARTICULAR CIRCUMSTANCES.—In examining the great number of conflicting decisions of the courts in applying the general rule, we find that the great diversity of opinion has arisen from the standpoint at which the courts consider the relative *status* of the servants in their employment. Leaving the class of cases already discussed, in which the question of inferior and superior grades of servants caused the divergence in the decisions, we come to a class of cases where the master's liability is determined from the nature and kind of service performed by the servants, the decisions being in the main based upon the question whether or not the services rendered belong to the same or separate and distinct departments of the master's general business, having no necessary connection with each other. Many able judges hold that this difference in the class or kind of service makes no difference in the application of the rule, while others equally as able, and perhaps with more reason and justice, base the master's liability alone upon this difference in the nature and kind of service.

The reason upon which the latter base their decisions is well stated by Stuart, J., as follows: "One is not a fellow-servant with another who has no participation in duties the neglect of which contributed to the injury complained of, but whose duties belong to a distinct department:" *Gillewater v. Madison etc. R. R.*, 5 Ind. 339; S. C., 61 Am. Dec. 101; in which case it is held that a carpenter building bridges for a railroad company is not a fellow-servant of those employed in the management of the company's train while traveling on such train by direction of the company in order to assist at another place in loading bridge-timber. So where the service of the workmen is divided into different departments and each department is committed to distinct bodies of workmen, workmen in the different departments are not fellow-servants: *Holton v. Daly*, 4 Ill. App. 25; so a day-laborer on a railroad track is not a fellow-servant of an engineer, they not being associated with each other in the performance of their respective duties: *Toledo etc. R'y v. O'Connor*, 77 Ill. 391; *Louisville etc. R. R. v. Collins*, 2 Duv. 114; nor is a draughtsman in locomotive-works and a carpenter employed in making repairs about the premises fellow-servants: *Baird v. Pettit*, 70 Pa. St. 477, 482, 483; nor a carpenter employed in the defendant's shop and an engineer, their employments being dissimilar and separate: *Ryan v. Chicago etc. R. R.*, 60 Ill. 171; S. C., 14 Am. Rep. 32; nor brakemen and those in charge of construction and repair of track: *Chicago etc. R'y v. Gregory*, 58 Ill. 272; in which case a brakeman was injured by being struck by a "mail-catcher" placed too near the track: *Atchison etc. R. R. v. Moore*, 31 Kan. 197; *Vantrain v. St. Louis Iron Mountain etc. R'y*, 8 Mo. App. 538; the same applies to the engineer, fireman, or conductor and the track repairers: *Chicago etc. R'y v. Moranda*, 93 Ill. 302, 324; S. C., 34 Am. Rep. 168; *Dick v. I. C. & L. R. R.*, 38 Ohio St. 339; *Lewis v. St. Louis etc. R. R.*, 49 Mo. 495; S. C., 21 Am. Rep. 365; a train dispatcher or train-master is not a fellow-servant of a locomotive engineer: *Crew v. St. Louis etc. R'y*, 20 Fed. Rep. 87; and a person employed to load and unload freight at the freight-depot of a railroad com-

pany and a switchman are not fellow-servants: *Chicago etc. R'y v. Henry*, 7 Ill. App. 322.

On the other hand, the former, basing their opinions on the argument that the servants are, nevertheless, employed in the furtherance of the same general business, hold the master not liable for negligence of an employee in one department of service resulting in injury to an employee in another and distinct department of the same general enterprise: *Morgan v. Vale of Neath R'y*, 5 Best & S. 570, 580; S. C., 33 L. J. Q. B. 260; in which case it is held that a carpenter at work on a shed near a turn-table, both belonging to the defendant, being injured by negligence of the trainmen in turning an engine on the turn-table, could not hold the common employer liable; and a bridge carpenter on the defendant's railroad, being required in the discharge of his duties to go upon the defendant's train, is regarded as "engaged in the operation" of the railroad, and for injuries to him from negligence of the trainmen the master is not liable: *Shroeder v. Chicago etc. R'y*, 47 Iowa, 375; so with the operatives in a mill and those whose duty it is to keep the fire-extinguishing apparatus in working order: *Jones v. Granite Mills*, 126 Mass. 84; the boiler-makers and those whose duty it is to finish and test the boilers: *Murphy v. Boston etc. R. R.*, 88 N. Y. 146; S. C., 8 Abb. N. C. 41; 59 How. Pr. 197; 42 Am. Rep. 240; a surveyor in the service of the defendant, injured by the negligence of the men in charge of the train while going to his place of employment on the defendant's train: *Ross v. N. Y. etc. R. R.*, 5 Hun, 488; a fireman or an engineer on an engine and those whose duty it was to put the engine in condition for the road and keep it in repair: *Mobile etc. R. R. v. Thomas*, 42 Ala. 672; *Columbus etc. R'y v. Arnold*, 31 Ind. 174; *Hubgh v. N. O. etc. R. R.*, 6 La. Ann. 495; S. C., 54 Am. Dec. 565; *Shanck v. Northern etc. R'y*, 25 Md. 462; *Wonder v. Baltimore etc. R. R.*, 32 Id. 411; S. C., 3 Am. Rep. 143; *Hard v. Vermont etc. R. R.*, 32 Vt. 473; an inspector of cars and brakeman: *Chicago etc. R'y v. Bragonier*, 11 Ill. App. 516; *Smith v. Potter*, 46 Mich. 258; S. C., 41 Am. Rep. 161; *Columbus etc. R. R. v. Webb*, 12 Ohio St. 475; a man whose duty it is to see that the roof of a mine was properly supported and the miners in the mine: *Froughear v. Lower Vein Coal Co.*, 62 Iowa, 576; *Hall v. Johnson*, 3 H. & C. 589; S. C., 11 Jur., N. S., 180; 34 L. J. Ex. 222; 13 Week. Rep. 411; 11 L. T., N. S., 799; a head brakeman and a yard-master: *Besel v. N. Y. etc. R. R.*, 70 N. Y. 171; a train guard on a train and the foreman of a gang of track layers: *Waller v. South Eastern R'y*, 2 H. & C. 102; track layers engaged in building a temporary track to a gravel pit, and the shovelers attached to the gravel train: *Lovegrove v. London etc. R'y*, 16 C. B., N. S., 669; a person whose only duty was to bring a boat to the wharf at a warehouse, there to be loaded by other employees of the same master, and those engaged in loading the boat: *Lavell v. Howell*, 1 C. P. Div. 161; S. C., 45 L. J. 387.

The conflict between these two lines of decision seems to cease in the final result arrived at by the courts, though their reasoning in arriving at the result is as conflicting as ever, when we come to another class of cases in which the general rule is uniformly applied. Whenever the servants are manifestly in the same common service, and engaged upon the same class or kind of work, there is no conflict. These two conflicting lines of decisions, uniting in this particular in their results, gives rise to a class of cases in which the one line either assumes or decides that the employment is one of a consociation of duties, and the other line simply applies the rule to all who are working for the same master to accomplish the general result. Conformably with the foregoing, the following cases hold that those mentioned are fellow-ser-

vants within the operation of the general rule: Engineer and brakeman on the same train: *Summerhays v. Kan. Pac. R'y*, 2 Col. 484; *Pittsburgh etc. R. R'y v. Lewis*, 33 Ohio St. 196; engineer, brakeman, and shovelers on a construction train: *St. Louis etc. R. R. v. Britz*, 72 Ill. 256; engineer and brakeman in the employ of the same company: *Louisville etc. R. R. v. Robinson*, 4 Bush, 507; *Moran v. N. Y. etc. R. R.*, 3 Thomp. & C. 270; S. C., 67 Barb. 96; *Pittsburgh etc. R'y v. Devinney*, 17 Ohio St. 197; *Pittsburgh etc. R'y v. Ranney*, 37 Id. 665; fireman and brakeman: *Greenwald v. Marquette etc. R. R.*, 49 Mich. 197; *Kersey v. Kansas City etc. R. R.*, 79 Mo. 362; fireman and engineer: *Jordan v. Wells*, 3 Woods, 527; laborer on a construction train engaged in unloading iron and the engineer of the train: *Chicago etc. R'y v. Keefe*, 47 Ill. 108, holding that the duties that attached the laborer to the train made him a part of its equipment; track repairers and those engaged in running the trains: *Gormley v. Ohio etc. R'y*, 72 Ind. 81; track repairers cannot recover for injury caused by the failure of an engineer and a fireman to light the head-light of the engine: *Pennsylvania R. R. v. Wachter*, 60 Id. 395; *Collins v. St. Paul etc. R. R.*, 30 Minn. 31; so a station-agent having general charge of the tracks at the station is a fellow-servant with the trainmen running trains over those tracks: *Brown v. Minneapolis etc. R'y*, 31 Id. 533; *Evans v. Atlantic etc. R. R.*, 62 Mo. 49; so a sectionman traveling over the road on a hand-car in the line of his duty is a fellow-servant of the engineers and conductors of the company's trains: *Blake v. Maine Central R. R.*, 70 Me. 60; S. C., 35 Am. Rep. 297; and a day-laborer in the defendant's shops and the man employed in running the steam-hammer: *Hawrath v. Northern etc. R. R.*, 46 Md. 280; S. S., 5 Rep. 698; so a carpenter who raises a staging to enable a plumber to put a gutter on a building and the plumber in using the scaffolding are fellow-servants, if employed by same employer: *Killea v. Faxon*, 125 Mass. 485; so a car inspector and a yard switchman, whose duty it was to send cars needing repairs to the shop, are fellow-servants: *Gibson v. Northern Cent. R'y*, 22 Hun, 289; a telegraph operator who receives and transmits telegraphic orders to engineer of an "extra": *Dana v. N. Y. Cent. R. R.*, 23 Id. 473; one engaged in coupling and uncoupling the cars on a train and the engineer and conductor of the same train: *Wilson v. Madison etc. R. R.*, 18 Ind. 226; a yard hand whose duty it is to perform such work as the foreman should require and one employed in stripping engines, when the foreman has ordered the yard hand to assist the stripper: *Chicago etc. R'y v. Schenring*, 4 Ill. App. 533; the engineer and conductor of a wood train engaged in moving wood for the company under contract with a contractor and the men employed by the contractor: *Illinois etc. R. R. v. Cox*, 21 Ill. 20; a station-master having charge of making up of trains and a brakeman on a train made up by direction of station-master: *Hodgkins v. Eastern R. R.*, 119 Mass. 419; a locomotive engineer and a switchman on the track over which he runs: *Brown v. Central Pacific R. R.*, 6 West Coast Rep. 797 (Cal.); *Smith v. Memphis etc. R. R.*, 18 Fed. Rep. 304; a brakeman and a switchman on same road: *Slaterry v. Toledo etc. R'y*, 23 Ind. 81; fireman and a switchman: *Tinney v. Boston etc. R. R.*, 52 N. Y. 632; *Harvey v. N. Y. Cent. etc. R. R.*, 88 N. Y. 481; the engineer of an elevator and the other employees whose duties required them to use the elevator: *Stringham v. Stewart*, 27 Hun, 562; S. C., 64 How. Pr. 5; the engineer of hoisting-works, used in raising and lowering men and materials in the sinking of a shaft, is a fellow-servant of the men in the shaft engaged in excavating and loading the rock to be hoisted: *Buckley v. Gould & Curry S. M. Co.*, 8 Saw. 394; S. C., 14 Fed. Rep. 833; *Bartonshill Coal Co. v. Rrid*, 3 Macq. 206; S. C., 4 Jur., N. S., 767; in which latter case the ground of the decision

was that the engineer and miners were engaged by the same master in the common enterprise of getting coal to the surface of the ground, and hence were fellow-servants within the rule; so miners who are engaged in a mine in breaking down the ore with picks, and by blasting, are fellow-servants with those who load it into barrows and wheel it away, being engaged in the same line of employment: *Keilley v. Belcher S. M. Co.*, 3 Saw. 500; and a switchman in railroad yard having charge of moving the cars from one switch to another and the engineer of the yard engine: *Columbus etc. R. R. v. Troesch*, 68 Ill. 545; S. C., 18 Am. Rep. 578; *Satterly v. Morgan*, 35 La. Ann. 1166; a brakeman employed in turning a switch on one track is a fellow-servant, within the rule, of an engineer of the same corporation upon an adjacent track in the same yard: *Randall v. Baltimore etc. R. R.*, 109 U. S. 478; a private detective employed by defendant, who is injured while walking along the track in performance of his duties, is a fellow-servant of the men in charge of the trains of the defendant: *Pyne v. Chicago etc. R'y*, 54 Iowa, 223; S. C., 37 Am. Rep. 198; a person engaged in carrying water to the laborers on a construction train, and to assist in gathering up the tools, is a fellow-servant of the laborers: *Missouri Pac. R'y v. Haley*, 25 Kan. 35; but under the act of February 26, 1874, the master is liable for injury done to him by the laborers. But a pilot, whom the owner of a ship is bound by law to employ, does not take upon himself the risk of injury from the negligence of one of the crew: *Smith v. Steele*, L. R. 10 Q. B. 125; S. C., 44 L. J. Q. B. 60; and in *Louisville etc. R. R. v. Yandell*, 17 B. Mon. 586, it was held that the general rule had no application when slaves were employed under contract with their owner.

WHEN INJURED SERVANT IS MINOR, the application of the general rule is, with the limitation hereafter given, the same as in case of persons of mature years: *Ohio etc. R. R. v. Tindall*, 13 Ind. 366; *Brown v. Maxwell*, 6 Hill, 592; S. C., 41 Am. Dec. 771. But in applying the rule, regard must be had to the capacity and understanding of the minor, it appearing to be settled that he can be held to no greater degree of intelligence and capacity than his youth, inexperience, and want of judgment, as known to his employer, would warrant: *St. Louis etc. R'y v. Faliviers*, 56 Ind. 511; as in the employment of a minor as a brakeman on a railroad train, it was held that the company was liable for any injury to him by the negligence of his fellow-employees if he did not have sufficient discretion to comprehend the dangers of the employment: *Hamilton v. Galveston etc. R'y*, 54 Tex. 556; and if a young person is employed about dangerous machinery, being unacquainted with its nature and use, the employer is bound to take care that the child is duly instructed therein, and if this is neglected, or the foreman directs the machinery to be used in a dangerous manner, of which the young person is not likely to be fully aware, the employer is liable for any injury to the young person from such use of the machinery: *Grizzle v. Frost*, 3 F. & F. 622; in which case a young child was set to work removing the cans placed to receive hemp from a carding-machine when they became filled, and to replace them with empty cans. The machine had revolving rollers run by steam, and there was no means of quickly stopping the machine. The foreman directed her to pick up some pieces of hemp that had fallen on the floor and place them in the rollers; in doing so her hand was caught in the rollers, and before the machine could be stopped, owing to the lack of proper means for stopping it, her arm was badly injured. In a case where a boy of tender years, engaged as a helper in a machine-shop of the defendant, was ordered by the superintendent to go up a ladder among dangerous belts in order to adjust a belt, and having received serious injury in attempting to obey the order, the question

of his capacity and experience having been submitted to a jury, and the jury finding that it was highly dangerous to send a boy of his age and experience among those belts, the court held that the question of fellow-employment could not be raised in the case, putting the decision on the ground that the boy's contract of service did not include such service, and in entering the service of the company he took only the risks incident to his contract of employment, and that on account of his youth he could not be expected to know the danger of obeying the orders of the superintendent: *Railroad Co. v. Fort*, 17 Wall. 553. Whether the minor is of sufficient capacity and experience to know the hazards of any given employment is a question for the jury: *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548. But a boy fourteen years of age, having had two and a half years' experience, cannot recover for injury suffered in consequence of the negligence of a fellow-employee: *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374; S. C., 39 Am. Rep. 457.

VOLUNTEER ASSISTING SERVANT OF ANOTHER.—A person voluntarily assisting the servant of another in the performance of his duties, either gratuitously or at the request of the servant, cannot recover against the master for any injury received while so assisting in consequence of the servant's negligence: *Osborne v. Knox etc. R. R.*, 63 Me. 49. Accordingly it was held that where the servants of a railroad company were turning a truck on a turntable, the plaintiff's intestate volunteered to assist, and while so engaged was injured by reason of the careless running of an engine against the truck, the railroad company was not liable, as by so volunteering he could not impose a greater obligation on the company than it owed to its hired servants: *Degg v. Midland R'y*, 1 H. & N. 773; S. C., 3 Jur., N. S., 395; 26 L. J. Exch. 171. So where the defendant's porters were engaged in lowering bales of cotton from his warehouse into his wagon, which was also in charge of servants of the defendant, the plaintiff, being in a hurry to receive a load of cotton, at the request of the defendant's servants assisted them in the work of receiving the bales into defendant's wagon, and while so assisting he was injured by the falling of a bale of cotton on him in consequence of the negligence of defendant's porters, it was held that there could be no recovery: *Potter v. Faulkner*, 1 Best & S. 800; S. C., 8 Jur., N. S., 259; 31 L. J. Q. B. 30; 10 Week. Rep. 93; 5 L. T., N. S., 455. But where the plaintiff volunteered to and assisted the defendant's servants in the delivery of the plaintiff's heifer, in the absence of a sufficient number of the defendant's men to shunt the horse-box to the siding from which alone the heifer could be delivered, and while so doing was injured by reason of the negligence of other employees of the defendant in allowing the train to come out of the siding, it was held, in *Wright v. London etc. R. R.*, L. R. 1 Q. B. Div. 252, that the plaintiff was not a "mere" volunteer, and was entitled to recover, he being on the defendant's premises by consent for the purpose of expediting the delivery of his own stock.

SHERFEY v. BARTLEY.

[4 SNEED, 58.]

IT IS NO DEFENSE TO ACTION FOR INJURY FROM BITE OF VICIOUS DOG THAT PLAINTIFF WAS TRESPASSER at the time upon the land, if the owner of the dog, knowing of the propensities of the dog, permits it to run at large.

ACTION for damages. The opinion states the facts.

Britton and Arnold, for the plaintiff in error.

William Hawkins, for the defendants in error.

By Court, HARRIS, J. This action was commenced by the defendants in error before a justice of the peace of Greene county, for injuries inflicted upon the plaintiff Phœbe, by a vicious dog of the defendant Sherfey. The justice gave judgment for the plaintiff for twenty-five dollars damages, and the defendant removed the cause into the circuit court of Greene county by appeal, where the justice's judgment was affirmed; and the defendant has appealed in error to this court.

The proof shows that the defendant's dog bit Mrs. Bartley in an old field of the defendant, where she was gathering berries, about one fourth of a mile from the house of defendant; and if defendant had not driven off the dog, he might have killed her; that there was corn growing in that portion of the field near the house of defendant, and the neighbors were in the habit of going to the field to pick berries. Several witnesses state that the dog had attacked them on the road, and, on one occasion, as far as a mile from the house of his owner. Witness Russell stated that in the spring of 1853 (more than a year before the plaintiff was bitten) defendant told him "that his dog would sometimes bite, and for him to be careful how he came about his premises." The proof shows that the damage sustained by the plaintiff was at least twenty-five dollars. Upon this state of facts, the court instructed the jury "that in order to recover in this case, the plaintiff must prove the injury complained of; that defendant's dog was of vicious habits, accustomed to bite, and that defendant had knowledge of this fact before the injury complained of, and, with such knowledge, permitted his dog to run at large. That if, at the time the injury complained of, the plaintiff Phœbe Bartley was in the field of the defendant gathering berries, she would, in law, be a trespasser; and upon a suit being instituted, the defendant would be entitled to recover damage for such trespass; but the fact that the plaintiff was in the field of the defendant at the time she was bitten by the dog would be no defense to the present suit, if the proof showed that the defendant's dog was vicious, accustomed to bite or attack people, and that defendant had knowledge of this fact before the injury in this case occurred, and, with such knowledge, permitted his dog to run at large."

Upon this record the plaintiff in error has raised two questions: 1. It is insisted that the *scienter* is not proved; and, 2.

That the charge of the court is erroneous. Upon the first proposition we think the evidence of the witness Russell would be sufficient to sustain the verdict. He says that more than a year before the injury complained of the defendant told him "that his dog would sometimes bite, and for him to be careful how he came about his premises." But there are other circumstances proved tending to show that the defendant had knowledge of the vicious propensities of his dog.

The second objection rests upon the following portion of the charge of the court: "That if, at the time of the injury complained of, the plaintiff Phoebe Bartley was in the field of defendant gathering berries, she would, in law, be a trespasser; and, upon a suit being instituted, the defendant would be entitled to recover damages for such trespass; but the fact that the plaintiff was in the field of defendant at the time she was bitten by the dog would be no defense to the present suit."

Is this charge correct? We think it is. In the case of *Smith v. Pelah*, 2 Stra. 1264, Lee, C. J., ruled that, if a dog have once bitten a man, and the owner, having notice thereof, keep the dog, and let him go about, and he bite another person, case will lie against him at the suit of the person bitten, though it happened by his treading on the dog's toes; and that it is no answer to the action, where the defendant knew the vicious propensities of the animal, to prove that the party injured was himself guilty of some imprudence or negligence in the transaction:" 3 Stark. Ev. 981.

The defendant knew his dog was vicious, and disposed to attack and bite persons, and was bound to have so confined him as to prevent him from doing mischief.

Let the judgment be affirmed.

LIABILITY OF OWNERS FOR INJURIES DONE BY VICIOUS DOGS: See *Marsh v. Jones*, 52 Am. Dec. 67, and note collecting prior cases; *McCaskill v. Elliott*, 53 Id. 706.

LEA v. WHITE.

[4 SNEED, 73.]

HABEAS CORPUS IS NOT AVAILABLE REMEDY TO RESTORE TO MASTER HIS APPRENTICE when illegally detained from him. The object of the writ is not to enable persons to assert a right to property, or to the services of another, but to protect the liberty of the subject.

APPEAL FROM DECISION OF CIRCUIT COURT DISMISSING WRIT OF HABEAS CORPUS WILL NOT BE ENTERTAINED by the supreme court of Tennessee.

HABEAS CORPUS. The opinion states the facts.

Peck and Meek, for the plaintiff.

Heiskell and J. R. Cocke, for the defendant.

By Court, HARRIS, J. On the twenty-seventh of November, 1854, the plaintiff exhibited her petition to the circuit judge, alleging that the defendant unlawfully detained from her two free girls of color, who had been bound as apprentices to her by the county court of Grainger, and prayed for a writ of *habeas corpus*. This writ was granted, returnable to the circuit court of Grainger county, and at the return term, on motion of the defendant, the writ of *habeas corpus* was quashed by the court, and the plaintiff has appealed in error to this court.

Is a *habeas corpus* an available remedy to restore to the master his apprentice, when illegally detained from him? We think not. This question was directly in judgment before the court of king's bench in the case of *King v. Edwards*, 7 T. R. 745. The facts were, that one Gabriel, an apprentice, having entered into the sea service and received the bounty money, the master moved for a *habeas corpus* to bring him up, in order that he might be restored to him. The court held, upon a rule to show cause why the writ should not be quashed, that though the apprentice might obtain the writ, the master could not: that its object was the protection of the liberty of the party. That the master was not without his remedy, for that he might have his action against those who detained his apprentice, knowing him to be an apprentice. *King v. Reynolds*, 6 Id. 497, is to the same effect.

The object of the writ of *habeas corpus* was not to enable persons to assert a right to property, or to the services of another, but to protect the liberty of the subject. An action on the case for seducing the apprentice from the master's service, instead of a *habeas corpus*, would have been a proper remedy.

It has also been repeatedly held by this court, that from the decision of a circuit court dismissing a writ of *habeas corpus*, an appeal will not be entertained.

There is no error, and the judgment of the circuit court will be affirmed.

HABEAS CORPUS, WHETHER PROPER REMEDY TO RESTORE MASTER HIS APPRENTICE: See Church on Habeas Corpus, secs. 93, 94, 455; and *Williamson's Case*, ante, p. 374, and note thereto.

SEAY v. BACON.

[4 SHEED, 99.]

ISSUE OF FEMALE SLAVE FOLLOWS CONDITION OF MOTHER. The ownership of the mother carries with it the property in her children born during the period of such ownership, and the mother and issue are treated, in respect of the title and rights of the owner, as an aggregate property. Whatever affects the rights or remedies of the owner as respects the mother equally affects his rights and remedies in respect to her issue, while the unity of interest and possession is unsevered; and if the right of the owner is saved from the statute of limitations for a definite period as to the mother, it is saved likewise as to the issue born of her during such period.

BILL in chancery. The opinion states the facts.

W. F. Keith, Welcker, and Humes, for the complainants.

Lyon and Maynard, for the respondents.

By Court, **McKINNEY, J.** This bill was brought for the recovery of a number of slaves. The only question necessary to be considered is in respect to the application of the statute of limitations. The chancellor decreed for the complainants, and the case is brought to this court by appeal.

The facts are these: "On the third of February, 1831, William Gillum, the maternal grandfather of the complainants, executed the following deed of gift: Know all men by these presents, that I, William Gillum, of the county of Hanover," state of Virginia, "hath this day given to my daughter Jane R. Seay's children one negro girl named Dinah, a slave. The right and title of the said slave unto the said Jane R. Seay's children, their executors, etc., I will forever defend," etc.

Jane R. Seay, the daughter of Gillum, and mother of the complainants, was at the time of the above gift a married woman, wife of William H. Seay. The slave Dinah was delivered into the possession of Seay and wife, together with the deed of gift. Shortly after the gift, Seay and wife removed to Tennessee and brought with them the girl Dinah, then some thirteen years of age. And on the second of June, 1832, Seay and wife, by a joint bill of sale in the usual form, conveyed the slave Dinah to the defendants' intestate, William Jackson, for the consideration of four hundred dollars. The deed of gift for the slave from Gillum to the complainants had not been proved or registered either in Virginia or Tennessee; but the proof establishes that Jackson had full notice of its existence at the time of his purchase, and full knowledge of its provisions.

At the date of said deed of gift, Seay and wife had five chil-

dren living, the eldest of whom was then about twelve, and the youngest two years of age; three other children were born afterwards. And all of said children are complainants in the present bill.

This bill was filed on the ninth of February, 1852, more than twenty-one years after the execution of the deed of gift. In the interval between the gift and the filing of this bill the slave Dinah gave birth to six children, who together with Dinah are sought to be recovered by the bill.

It is conceded that the five children of Jane R. Seay who were in being at the date of the gift were at the time of its execution all minors; and that the present bill was filed within three years after the youngest of said five children had attained his majority. It is likewise conceded that several of the children of Dinah who are sought to be recovered were born after the eldest of the complainants had attained the age of twenty-one years, and was free from all disability to sue.

Upon these facts, it is admitted in the argument that upon the construction of the statute adopted in *Shute v. Wade*, 5 Yerg. 1, where several are entitled to a joint action, and all are under disability at the time the right of action accrues, the statute will not begin to run until the disability is removed as to all—the complainants are entitled to recover Dinah and such of her children as were born before the eldest of the complainants attained the age of twenty-one years; but that upon the converse of the rule above laid down—namely, if any one of the several persons entitled to a joint action be free from disability when the right of action accrues, the statute will run against all—the complainants are barred of a recovery as to all of the children of Dinah born after the eldest of the complainants attained majority.

The argument in support of this position is ingenious; it distinguishes between the condition of the mother and her issue. The child, it is said, is, in law and in fact, a separate, distinct, individual being; that as such it is capable of a separate dominion, property, and possession, and the title and possession may be transferred in any of the various modes provided for the transfer of other personal chattels; that it is a thing, in and of itself, susceptible of an exclusive and adverse ownership and possession; that the source whence or the manner in which the title is derived is of no importance in view of the statute of limitations—the application of the statute depending alone upon the fact of adverse possession, regardless of the title; that upon the birth of the child the title of the mother attaches to

the child, and the owner of the former instantly becomes invested with a perfect title to the latter, in virtue of which he may dispose of it, separately, in any method known to the law; and if adversely held, it may be sued for, separate from the mother, in any form of action adapted to the recovery of other specific chattels. Consequently it is argued, when the mother is wrongfully held by another, at the birth of the child, a right of action accrues to the owner to bring a separate suit at his election for the recovery of the child alone, and a successive action for each child subsequently born. And hence the conclusion is deduced that the statute attaches at the instant of the birth of each child.

This reasoning, however plausible, is contrary to the course of professional and judicial opinion in this state. By our law the issue of a female slave follows the condition of the mother. The children are part of the mother, and, potentially, exist in her before they have a being. The ownership of the mother carries with it the property in the children born of her during the period of such ownership. The mother and her issue are treated, in respect of the title and rights of the owner, as an aggregate property. Whatever affects the rights or remedies of the owner as respects the mother equally affects his rights and remedies in respect to her issue.

It is certainly true in law as in fact, that this unity of interest and of possession is capable of being severed, either by the voluntary act of the owner, or the tortious act of another, or by act of law; and upon this being done, distinct and opposing rights may spring up. But until such severance is actually effected, the statute of limitations cannot operate upon part of the aggregate property and be inoperative as to the remaining part. If the right of the owner is saved for a definite period as to the mother, it is saved likewise as to the issue born of her during such period.

The argument for the defendants rests mainly, as we suppose, upon a mistaken assumption, namely that a separate right of action accrues to the owner for the recovery of each child at the moment of its birth. If the mother and her issue, as has been already assumed, constitute an aggregate mass, then the cause of action is entire; and being so, it cannot, upon principle, be split into several actions. The consequence would perhaps be that if a part were recovered in a separate action the judgment would be a bar to another action for that part of the property not sued for in the first action.

Decree affirmed.

CARTER v. PECK.

[4 SWEED, 203.]

COMMON CARRIER WHO SELLS THROUGH-TICKETS TO PLACE BEYOND HIS OWN LINE, in pursuance to an agreement between him and proprietors of connecting lines that passengers might pay the whole fare at either end and receive through-tickets, is liable for damages to passengers hindered and detained on their journey through the fault of the proprietors of a connecting line, and it is immaterial whether or not the passengers knew of the agreement between the carriers.

CASE. The facts are stated in the opinion.

Russell Houston and N. S. Brown, for the plaintiffs in error.
Andrew Ewing, for the defendant in error.

By Court, HARRIS, J. The defendant in error brought this action on the case against the plaintiffs in error, in the circuit court of Davidson county, for an alleged breach of their undertaking as common carriers to convey the plaintiff and his family from the city of Nashville to the city of Memphis. The defendants pleaded *non assumpsit*, upon which an issue was joined and submitted to a jury, who found for the plaintiff, and assessed his damages at two hundred dollars, for which judgment was rendered, and defendants moved for a new trial, which was refused, and they have appealed in error to this court.

It appears from the proof, as disclosed by the bill of exceptions, that the defendants were the proprietors of a line of stage-coaches from the city of Nashville to Waynesborough—Sims & Co. owned the line from Waynesborough to La Grange, where it connects with the Memphis and Charleston railroad, which runs to the city of Memphis; that by an arrangement between these three parties, it was agreed that passengers might pay the whole fare at either end of the line and receive a through-ticket. There is no proof to show that the arrangement was known to the plaintiff. The plaintiff paid defendants forty-five dollars, the usual price for three tickets, for himself, his wife, and servant, through from the city of Nashville to the city of Memphis. The plaintiff and family proceeded to Waynesborough in the coaches of the defendants, where he was informed by the agent of Sims & Co. that he could not receive him or his family as passengers to La Grange, nor would he agree to take them the next trip if there should be as many as six or seven passengers coming down from Nashville. The defendants were the owners of another stage line, from Waynesborough to Jackson, and their agent received eighteen dollars from the plaintiff for the fare of

himself and family to that place, where he was sick and detained two or three days on expenses, and then paid thirty-four dollars for a private conveyance to Somerville, from which place he proceeded to Memphis by paying his fare on the railroad.

The court charged the jury that if the plaintiff was aware of the agreement between the defendants and the proprietors of the other line, then the defendants would not be amenable for the fault of Sims & Co., if they were not to blame themselves. On the other hand, if the plaintiff was unaware of such arrangement, and suffered delay and sickness or paid out money from not being able to proceed in the Waynesborough and La Grange stages, he would be entitled to recover.

We think there is no error in this record for which the judgment should be reversed. The charge of the court is perhaps erroneous, but that error is in favor of the plaintiffs in error, and of course furnishes no ground for reversal here. We think that when the defendants in the court below received the plaintiff's money and gave him through-tickets, they thereby became bound for his transportation on the entire line, unavoidable accidents, such as no prudent foresight could have provided against, excepted, and that he was entitled to a strict performance by the defendants of their undertaking, or to recover compensation in damages for any breach thereof; that the arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that agreement, nor was he bound to look to any person for the performance of the defendants' undertaking but themselves. If either party to that agreement was guilty of a breach, that was a matter for adjustment between themselves. By this arrangement, the proprietors at each end of the line were authorized to receive the fare and give through-tickets, to show that they had undertaken and received pay for the transportation of the passenger over the entire line, and the proprietors of the other portions of the line were their agents, whom they trusted to perform that part of their contract which lay on the portions of the line owned by them.

If this view of the subject be correct, and we think it is, then it was wholly immaterial whether the plaintiff knew of this arrangement or not. If the defendants, when they sold plaintiff the tickets, intended that he should risk the proprietors of the other portions of the line to carry him through, then they should have so stipulated, and informed him frankly of this arrange-

ment, so that he might, with a full knowledge of the facts, have elected whether he would pay them the entire fare, and take through-tickets, or pay them only for that portion of the line of which they were the proprietors, and make his own arrangements for the balance of the journey. They assumed, however, to carry him through, and are responsible for the undertaking. The amount of damages in this case constitutes no ground for reversing the judgment. If the number of passengers who were in the habit of coming down in the Nashville coaches was greater than Sims & Co. had facilities to carry on their stages to La Grange, then they were bound, at their peril as common carriers, and by their agreement, to provide a sufficient number for that purpose.

It is no slight inconvenience to a passenger to be stopped and detained on the road, and they should have provided against such contingency. But to aggravate the case, when Sims & Co. refused to carry the plaintiff and his family through, and he called upon the agent of defendants to carry him on their line to Jackson, he was again forced to pay the sum of eighteen dollars to be carried to that point, although he had already paid to the defendants the full price to be carried to Memphis. It is due to the traveling community that they should be properly protected against such impositions and delays, and such was the view taken of it by the jury, as we think very properly.

Let the judgment be affirmed.

COMMON CARRIERS' LIABILITIES IN CASE OF THROUGH CONTRACTS: See *Hart v. Rensselaer etc. R. R.*, 59 Am. Dec. 447, and notes; note to *Farmers' & Mech. Bank v. Champlain Transportation Co.*, 56 Id. 84. The principal case is quoted with approval in *Louisville etc. R. R. v. Weaver*, 9 Lea, 43, 44, on this question; but see the comments upon it in *Nashville etc. R. R. v. Sprayberry*, 8 Bart. 344; S. C., 9 Heisk. 856.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

YORK *v.* McNUTT.

[16 TEXAS, 13.]

PURCHASER OF EQUITABLE TITLE TAKES IT SUBJECT TO ALL EQUITIES, though he purchases *bona fide*, for a valuable consideration, and without notice thereof.

ASSIGNEE OF BOND FOR TITLE TAKES IT SUBJECT TO DEFENSES available against the original vendee, notwithstanding he purchased for a valuable consideration, and without notice of such defenses.

SOME LIMITATION SHOULD BE FIXED BY LAW TO SUITS as well for specific performance as for rescission of contracts.

BILL praying specific performance and a quieting of title, filed by the administrator of John York against Nicholas McNutt and others. McNutt in 1842 executed to Hughes a bond for title to a tract of land, to be performed as soon as he, McNutt, should obtain a patent to the land from the government. The bond was recorded in the county where the land lay, in 1848. Hughes assigned to Coe, and Coe in 1845 assigned to John York, the plaintiff's intestate. In the same year McNutt obtained a patent to the land, and in 1850 resold the land to Means, who afterwards conveyed it to Wimbish. This suit was brought in 1854 against McNutt, Means, and Wimbish. The defense was, that the consideration for the bond was money won by Hughes, the original vendee, from McNutt, the vendor, at cards, and that there was cheating in the game. The court instructed that if this defense were true the bond was void. The plaintiff appealed.

R. E. Williams, for the appellant.

Cunningham and Holt, for the appellees.

By Court, HEMPHILL, C. J. The appellant, in his argument, states that the only point in the record is, whether the illegality of the consideration of the bond is such as to avoid it in the hands of an innocent purchaser without notice; the bond never having been repudiated by McNutt until the sale from him to Means, which was years after the bond came by assignment into the hands of York. The point involves important considerations, and under a more full discussion might require an extended examination. For the present, the inquiry will be restricted to such views as are essential to the disposition of the question.

It must be admitted that there is great apparent hardship in affecting subsequent vendees with all the equities, though latent, which may subsist between the vendor and the first vendee, where the sale is only of the equitable title, and especially so where the rule is well established that a subsequent purchaser without notice will be protected against the equities of the vendor, or those claiming in privity under him. But it appears very clearly from the authorities that the protection given to purchasers for valuable consideration without notice extends only to cases where they have taken a conveyance, or, in other words, when they have purchased the legal title: *Dart on Vendors*, 462; *Snelgrove v. Snelgrove*, 4 Desau. 274; *Alexander v. Pendleton*, 8 Cranch, 462; *Boone v. Chiles*, 10 Pet. 177; *Vattier v. Hinde*, 7 Id. 252. But where the purchase is only of the equitable title, it is taken with all its imperfections and equities, notwithstanding a valuable consideration may have been given, and there may have been no notice of the equity or defense against the title: *Chew v. Barnett*, 11 Serg. & R. 389; *Reed v. Dickey*, 2 Watts, 459. In the case of *Chew v. Barnett*, *supra*, the court say that "when it is asserted that a purchaser for a valuable consideration takes the title free of every trust or equity of which he has no notice, it is intended of the purchase of a title perfect on its face; for every purchaser of an imperfect title takes it with all its imperfection on its head. It is his own fault that he confides in a title which appears defective, and he does so at his peril."

Under this view of the law, the title of Hughes, and of his assignees, Coe and York, was but a title to go into equity to have the legal estate conveyed, and in the hands of the assignees was subject to all the defenses against the original vendee. How far this doctrine is modified by our registry acts, as against sales from the vendor of which the vendee of the equitable title had no

notice, need not be considered. The question does not arise in this case. The equity is claimed by the vendor himself. The claim is not set up by derivative vendees from him; at least, such vendees do not claim by sale prior in point of time to the execution of the bond. The equity of the vendor arises out of the original transaction between himself and his primitive vendee, Hughes, and the assignees of Hughes having only his imperfect title, can set up no rights as against the original equities of the vendor which could not have been maintained by Hughes. The laws of registry, which might in a proper case be invoked as against derivative vendees whose titles have not been recorded, have no bearing on the case.

The facts of this case show the necessity of some limitation being fixed by law to actions as well for specific performance as for rescission of contracts. Had the plaintiff delayed until the death of the witness who proved the want of consideration, he must of necessity have been entitled to a decree for a specific performance; and that the defendant has been enabled at this late day to avoid his contract, is allowing a very long period for the practice, in effect, of deception on the community, who generally rely on the acts of parties not denied or repudiated by those in interest.

There being no error in the judgment, ordered that the same be affirmed.

Judgment affirmed.

PURCHASER OF EQUITY TAKES IT SUBJECT TO PRIOR EQUITIES: *Polk v. Gallant*, 34 Am. Dec. 410, note 413; *Perkins v. Hays*, 5 Id. 680. A bona fide purchaser of a certificate for land is subject to equitable defenses, and cannot thereunder claim the land against former vendees of the land: *Smith v. Tucker*, 25 Tex. 60, citing the principal case.

THE PRINCIPAL CASE IS CITED to the point that upon appeal, if the objections go to the merits and foundation of the action, so that upon the case made by the pleadings the party has no right to the judgment, such objections will be considered whether assigned as error or not: *Seise v. Malsch*, 54 Tex. 357.

STEWART v. MACKEY.

[16 TEXAS, 56.]

MORTGAGE BY HUSBAND OF HOMESTEAD IS NOT INHIBITED BY CONSTITUTIONAL PROVISION that husband may not alienate homestead unless by consent of the wife, but the mortgagee will take subject to the contingency that the homestead may not be changed, or that the wife may not assent, and that in the mean time his claim may be barred by the statute of limitations.

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MORTGAGE OF HOMESTEAD BY HUSBAND AND WIFE, TO BE VALID, must be conditioned with a power of sale by the mortgagee upon default of payment; and without this condition, her assent to the mortgage is without any effect, and neither adds to nor diminishes the force and effect of the mortgage by the husband.

MORTGAGE OF HOMESTEAD BY HUSBAND HAS FORCE AS LIEN AS SOON AS property mortgaged is abandoned and another homestead is acquired.

THERE IS SUFFICIENT ABANDONMENT AND CHANGE OF HOMESTEAD to render mortgage of homestead by husband effectual, where the husband two years previously ceased to occupy the mortgaged property as a homestead, and since then occupied his present residence as a homestead, which is different from the property mortgaged, and where no question is raised as to the rights of the wife.

FORECLOSURE suit. The opinion states the case.

G. W. Smith, for the appellant.

G. Quinan, for the appellee.

By Court, **HEMPHILL, C. J.** This was a suit on a promissory note, and for the foreclosure of a mortgage. There was judgment for the amount due on the note, but an order for foreclosure was refused, and this has been assigned as error. The facts of the case as agreed upon by counsel, so far as they affect the question of foreclosure, are to the effect that on the twenty-ninth of May, 1851, at the time the note bears date, John Mackey, the defendant, and his wife, executed in due form a mortgage on the property described in the petition; that Mackey was, at the time of making the said mortgage, the head of a family, and occupied the property embraced in the mortgage as a homestead at that time; that the property was worth eighteen hundred dollars; that about two years ago Mackey ceased to occupy said property as a homestead, and has since occupied the place he now resides at as a homestead, which is different from the property mortgaged.

The only question is, whether the mortgage, though ineffectual at the time of its execution, could be enforced subsequently, and after the homestead, which had been mortgaged, was abandoned and another homestead had been acquired. Were it not for the provision of the constitution that the owner of a homestead, if a married man, should not be at liberty to alienate the same unless by consent of the wife, the husband would have the unquestionable power to dispose of it at pleasure. His right, his absolute title in the property, is not affected, but his power of alienation is restricted, and for the distinct and specific purpose of securing a homestead to the family. To effect this purpose, the wife if living

must be consulted before the sale, and this for many reasons which might be enumerated, but especially that she may not be deprived of one homestead without provision for the acquisition of another. The entire object of the law and the constitution is to secure a homestead, and no infringement upon the husband's rights of property, except such as may be necessary for the object designed, is intended by the law or is to be presumed. Under this view, the husband may, in conformity with law, make any disposition whatever of the homestead, being his own property, provided his act does not interfere with the absolute right of enjoyment and use of the homestead by the husband, wife, and family, or with its sale, if this be necessary to raise funds for the acquisition of another homestead, or with the right of the wife to refuse to abandon her homestead, or acquiesce in its sale, or other disposition, without provision for another homestead. There appears to be no necessity to encroach upon the husband's right of alienation further than may be necessary to secure these objects, nor to inhibit a creditor from taking a mortgage from the husband, subject to the contingency that the homestead may not be changed or that the wife may not assent, and that in the mean time his claim may be barred by the statute of limitations, etc. No doubt, after the change, the homestead which has been abandoned becomes subject to forced sale for the benefit of creditors and the question is whether the plaintiffs have a lien on this property, in preference to other creditors, and we are of opinion that the mortgage took effect and had force as a lien as soon as the property mortgaged was abandoned and another homestead was acquired, and that they are entitled to foreclosure. No question is made in this case as to the rights of the wife, nor are any set up for her by the record.

The fact that the mortgage was executed by the wife, as is stated in the agreement, I have not considered as having any bearing in the cause. A mortgage by husband and wife of the homestead, to be valid, must be conditional with a power of sale by the mortgagee upon default of payment: *Sampson v. Williamson*, 6 Tex. 102 [55 Am. Dec. 762]. Without this condition, her assent to the mortgage is without any effect, and neither adds to nor diminishes the force and effect of the mortgage by the husband.

The question raised on this case was determined in the case of *Lee v. Kingsbury*, 13 Tex. 68 [62 Am. Dec. 546], to which we refer in support of this decision. It is ordered, adjudged, and decreed that the judgment for the amount due on the note be

affirmed, and that the judgment refusing to decree a foreclosure be reversed, and such judgment be rendered as should have been pronounced below.

Reversed and reformed.

MORTGAGE OF HOMESTEAD IN TEXAS: See *Sampson v. Williamson*, 55 Am. Dec. 762; *Lee v. Kingsbury*, 62 Id. 546, and notes, wherein many of the propositions stated by the court *arguendo* are maintained.

HUSBAND IS SEISED OF HOMESTEAD IN FEE, and is placed by the statute under a mere personal disability to alienate his homestead without the signature of his wife as evidence of her consent: *Godfrey v. Thornton*, 46 Wis. 685, citing the principal case; see also *Sampson v. Williamson*, 55 Am. Dec. 762. The husband alone has the legal title to the homestead, and his absolute power of alienation is restricted only so far as is necessary to protect the homestead. Therefore a sale of the homestead by the husband alone vests the estate in the vendee, subject only to the use and occupation of the husband and wife until another homestead is acquired, or until the character of the premises as a homestead is otherwise gone: *Gee v. Moore*, 14 Cal. 476, citing the principal case.

MORTGAGE UPON HOMESTEAD PREMISES, INEFFECTUAL AT TIME OF ITS EXECUTION, could be enforced subsequently after the homestead had been abandoned and another homestead acquired: *Bowman v. Norton*, 16 Cal. 218, citing the principal case; see also *Lee v. Kingsbury*, 62 Am. Dec. 546. In *Campbell v. Elliott*, 52 Tex. 158, the mortgage was foreclosed while the property was still the homestead of the husband and wife, and the wife was not a party to the suit; whereas in the principal case the mortgage was sought to be foreclosed after the property had ceased to be a homestead, and after a new one had been acquired, and the principal case is distinguished on this ground.

ABANDONMENT OF HOMESTEAD: See *Taylor v. Hargous*, 60 Am. Dec. 606, and note discussing this subject 607-615. Use and occupation are necessary to constitute a homestead in Iowa: *Charless v. Lamberson*, 63 Id. 457, note

GEORGE v. THOMAS.

[16 TEXAS, 74.]

ONLY THOSE GROUNDS OF DEMURRER THAT GO TO PLAINTIFF'S RIGHT OF ACTION will be considered upon an appeal from a judgment overruling a general demurrer.

OBJECTION OF WANT OF PARTICULARITY IN STATEMENT OF CAUSE OF ACTION is not raised by general demurrer.

SUIT TO HAVE DIVISION LINE RUN BETWEEN TWO TRACTS OF LAND may be maintained where the deed of one tract, which was granted out of a larger tract, does not ascertain the boundaries of the land conveyed, but merely gives a description by which they may be ascertained, and where the owner of the other tract will not permit the line to be run; such suit is in the nature of a suit for specific performance.

SUIT CANNOT BE MAINTAINED TO HAVE DIVISION LINE RUN where such a line has been already run and marked by the parties.

DIVISION LINE RUN BY PARTIES IN INTEREST CANNOT BE DISREGARDED because it cannot be found in its whole extent, or because it was not actually run through, if its two extremes can be found, and it can be traced for a part of the distance.

LINES ACTUALLY MARKED IN RUNNING DIVISION LINE MUST BE ADHERED TO, though they vary from the course, and do not form a right line from corner to corner, especially after lapse of time and long-continued occupancy with reference to them.

WHERE LINE HAS BEEN MARKED ONLY PART OF WAY, the boundary for the rest of the distance will be a direct line from the termination of the marked line to the point of intersection, or to the corner called for.

DIVISION LINE WILL BE CONSIDERED CONTINUOUS LINE where it exists at its two extremities and for a principal part of the distance.

RULE FOR DETERMINATION OF DIVISION LINE BETWEEN GRANTOR AND GRANTEE OF PART OF TRACT is the same whether the deed or conveyance refer for its boundaries to the marked lines or monuments, or they be afterwards marked and established by the parties.

WHERE PARTIES HAVE AGREED UPON AND MARKED BOUNDARY LINE, and the possession is in accordance with it for such a length of time as may give title by disseisin, the line cannot be disturbed, although found to be erroneously established, unless there be clear proof that the possession was not adverse.

HUSBAND IS COMPETENT TO REPRESENT WIFE IN MATTER OF RUNNING BOUNDARY LINE, where it is done fairly and honestly, and she acquiesces in it, *mb e.*

INFANT ACQUIESCING IN SETTLEMENT OF BOUNDARIES AFTER COMING OF AGE WILL BE BOUND BY IT, *semble.*

CONVEYANCE REFERRING TO "DIVIDING LINE" will be construed to mean real line, and not an imaginary one, and will constitute an express recognition of such line by the parties.

GRANTEE CANNOT SET UP RIGHTS OF MARRIED WOMEN AND MINORS from whom he purchases in order to maintain rights in himself which his vendors neither asserted nor pretended to convey to him.

OBJECTIONS TO EVIDENCE SHOULD STATE GROUNDS THEREOF.

DECLARATIONS OF PUBLIC SURVEYOR WHILE MAKING SURVEY, respecting what he was doing, for whom, and why, are admissible as part of the *res gestæ.*

HEARSAY EVIDENCE IS ADMISSIBLE TO ESTABLISH OLD SURVEYS AND BOUNDARY LINES.

Suit for the establishment of a line of division, brought by Thomas and others, the appellees, against David George and others, the appellants. The petition alleged that the plaintiffs were owners of the lower half of a league of land originally granted to Eli Hunter, who in the year 1826 conveyed the upper half of this league to Freeman George, to be surveyed in a certain described manner. It was alleged that the upper half of the league had never been surveyed and partitioned from the

lower half, that the upper half belonged to the defendants, who had been often and amicably requested to consent to a partition of the upper from the lower half, but refused to permit any partition to be made. And the petition prayed that partition be made according to the terms and meaning of the conveyance from Hunter to George; and that the division line be run and be plainly marked and established by the decree of the court. The petition was filed in 1853. The defendant demurred generally, and denied generally, except that the defendants were each owners in severalty of the parts of the upper half league held by them respectively; and he pleaded the statute of limitations and adverse possession, and that the two halves had been partitioned more than twenty years ago by a well-established line, and the line had been since recognized by the parties. Verdict was for the plaintiffs. A motion for a new trial was overruled, and the defendants appealed.

Quinan and Ballinger, for the appellants.

J. W. Harris, for the appellees.

By Court, WHEELER, J. The demurrer was general; and it is well settled that upon appeal from the judgment overruling a general demurrer to a petition no grounds of demurrer will be considered which do not go to the plaintiffs' right of action. It cannot be denied that if, as alleged, the division line between the owners of the upper and lower halves of the league had never been run, it was the right of the parties to have it run, according to the original conveyance from Hunter to George, and that it was a wrong in any one to obstruct and prevent the running of it. It is objected that it is not averred what injury the plaintiffs have sustained, or are likely to sustain, by reason of the alleged refusal of the defendants to permit the line to be run. But it is a matter of which the court may judicially take notice, and need not be informed by averment that the owners of lands thus situated will be likely to sustain injury by not having the boundaries of their land ascertained and defined. That is the probable consequence and the reasonable presumption.

The right to have the line of division run in such a case, and to maintain an action, if necessary for that purpose, rests on the same principle as the right to an action for specific performance, where there is a contract to convey. The deed from Hunter to George, though an executed conveyance passing the title, did not ascertain the boundaries of the land conveyed, but only gave a description by which they might be ascertained by an actual

survey thereafter to be made in the manner indicated. As to the running of this line, it was in the nature of an executory contract, which may be enforced by suit for specific performance. Whether the plaintiffs should not have stated their case with more particularity, especially the acts of the defendants of which they complained, it is not necessary to consider, as the petition in this respect was not questioned by exceptions. It was sufficient on general demurrer.

But the case stated in the petition manifestly was not the case made out in evidence. It was proved incontestably that the dividing line had been run as early as 1835, and it was not proved that the defendants had been amicably requested and had refused to consent to the running of the line, or to permit it to be run. The line had been actually run and marked; was capable of being found and traced; some of the defendants had occupied up to it since 1835; it was known to the plaintiffs, and had been recognized by them; it had even been traced by a surveyor at their instance, who met with no interruption from any of the defendants while tracing the line actually run, but only when he undertook to run a new line. The essential averment of the plaintiffs on which their right of action depended, that is, that the line had not been run, was thus disproved; and this was an answer to their case.

But it is objected that this line, which it is admitted was commenced, was never completed. Upon this point the evidence is not conclusive. Some of the witnesses found and traced the line a considerable part of the distance, and found what they took to be the line nearly the whole of the way. There seems little reason to doubt that the line was completed, though not very accurately run. Messer proved the running of it a part of the way; and the plaintiffs' witness Collingsworth testifies that he found and traced the line a considerable part of the distance from the beginning point or corner on Peach creek. He also found a corner marked on the base line, and a line running from it, approaching the line from the beginning corner, but which, if extended, would not meet the latter. This proves simply that the line was not run with perfect accuracy; but it by no means proves that the running of it was not completed. Such inaccuracies, and even greater, as this witness, who was the district surveyor, testifies, are not uncommon. They do not invalidate surveys. If they did, there would be little security in titles, especially in the earlier titles of this country. Even if the line cannot be found in its whole extent,

or if it was not actually run through, yet as its two extremes can be found, and it can be traced for a part of the distance, it is not to be disregarded. In such cases, the course to be pursued is plain. The marked lines are to be followed as far as any trace of them can be found, and the connections made. The lines actually marked must be adhered to, though they vary from the course: *McNairy v. Hightour*, 2 Overt. 304; *Newsom v. Pryor*, 7 Wheat. 7. A line actually marked for the survey is to govern the boundary, although not a right line from corner to corner. Where a line has been marked only a part of the way, the boundary for the residue of the distance will be a direct line from the termination of the marked line to the point of intersection or to the corner called for: *Cowen v. Fauntleroy*, 2 Bibb, 261; *Preston v. Bowmar*, Id. 493; *Young v. Leiper*, 4 Id. 503; *Thornberry v. Churchill*, 4 T. B. Mon. 29 [16 Am. Dec. 125]; *Baxter v. Evell*, 7 Id. 333. Where a division line exists at its two extremities, and for a principal part of the distance, it will be considered a continuous line: *Rockwell v. Adams*, 6 Wend. 467. Nothing can be more clearly or certainly settled than that where a marked line can be found it shall be pursued, as far as may be done, in its whole extent; but if it does not extend to the point of intersection, then it must be continued until the intersection is made, taking the course called for or required by the deed: *Wishart v. Cosby*, 1 A. K. Marsh. 382; *Thornberry v. Churchill*, *supra*. And the rule is the same whether the deed or conveyance refer for its boundaries to the marked lines or monuments, or they be afterwards marked and established by the parties: *Waterman v. Johnson*, 13 Pick. 267; *Makepeace v. Bancroft*, 12 Mass. 469; *Davis v. Rainsford*, 17 Id. 212. If, therefore, the line cannot be traced in its whole extent, still it is to be observed, and cannot be departed from, where it can be found and traced; especially after such a lapse of time, and so long continued occupancy in reference to it.

It is by no means certain, however, from the evidence, that this line may not be traced with reasonable certainty, in its whole extent, by the use of sufficient industry and attention. It can be traced far enough, at least, to show that it was actually run; and it is proved undisputably that it was run as the dividing line between the proprietors of the upper and lower halves of the league nearly a quarter of a century ago; it has been occupied by the owners of the upper half ever since, and has been acquiesced in by all the parties in interest. Where the parties have agreed upon a marked boundary line, and the

possession is in accordance with it for such a length of time as may give title by disseisin, the line cannot be disturbed, although found to be erroneously established, unless there be clear proof that the possession was not adverse: *Moody v. Nichols*, 16 Me. 23.

But it is objected that the owners of the lower half were a married woman and a minor, and there is no proof of their consent to the running of this line. There is proof, however, that Lacy, the husband, assented to the running of it; and if it were necessary to the just decision of the case, as we shall see it is not, it might very well be held that the husband is competent to represent his wife in the matter of running a boundary line. If done fairly and honestly, and acquiesced in by her, it ought to be as binding upon her as upon others. So an infant acquiescing in the settlement of boundaries, after coming of age, will be bound by it. If he do not dissent when he comes of age, but acquiesces, he is forever bound: *Brown v. Caldwell*, 10 Serg. & R. 114 [13 Am. Dec. 660]. As has been said: "These settlements of boundary are common, beneficial, approved, and encouraged by courts, and ought not to be disturbed, though it was afterwards shown that they had been erroneously settled, if they had been acquiesced in for a number of years." "Convenience, policy, necessity, justice, all unite in favor of supporting such an amicable adjustment:" *Id.* 116. It is beneficial to all concerned, as well married women and minors as others. It is to be observed that neither Mrs. Lacy nor her daughter ever expressed any dissatisfaction with this line, though the latter was of age before she parted with the title. They are not the parties who have complained. They and their husbands acquiesced in it, and had they retained the title to the present time they doubtless would still have acquiesced in it. It cannot be doubted that its existence was known to them. There is no pretense of any fraud or unfairness in the running of it; and the inequality it produces in the quantity of acres of the respective proprietors, the extent of the survey being considered, is, at most, very inconsiderable. The acquiescence of the parties under whom the plaintiffs claim for so great a lapse of time, under the circumstances, ought to bind them if there were no evidence of the express assent and recognition of it by the plaintiffs' vendors. But there is evidence of such assent and recognition, which relieves the case of all difficulty. In the deed of partition between Mrs. Lacy and her daughter, then also a married woman, this dividing line is expressly recognized. One of the calls of the

deed is "to commence on Peach creek, at the dividing line between the upper half and the lower half of the said league No. 3, thence up the said dividing line," etc.

And again: "To commence on the corner of the dividing line," etc. They thus refer to this line as the boundary of the land; and recognize it as such by their deed executed and acknowledged with all the formalities necessary to pass their title. And afterwards in their deeds of conveyance to the plaintiffs, they again refer to and convey by this line as their boundary line. By commencing at the "dividing line" and running "up the dividing line," they of course mean a real, not an imaginary, line. It is thus placed beyond doubt or cavil that the line was known and recognized by them as their true boundary, by which they conveyed to the plaintiffs. After such a recognition of it, they could not have disturbed it if they would. Much less can the plaintiffs claiming under them by deeds which convey the title by this boundary line. They knew what they were buying, and by what line it was bound; it was a well-known line; the occupancy by the defendants upon it was notice to them of their understanding of it; their own deeds called for it; they have obtained all they bargained for, and have no cause to complain. They cannot set up the rights of the married woman from whom they purchase to maintain rights in themselves, which their vendors neither asserted nor pretended to convey to them. They cannot complain that the former did not sell to them all they might have sold by insisting upon a different division. They hold to the boundaries called for in their deeds; and that is all they can ask, however it might have been with their vendors. They, in a word, have not shown the pretense of a right to come in, at this late day, and under their recent purchases, to disturb the peace of the neighborhood, and unsettle landmarks and boundaries that have been established and acquiesced in for nearly a quarter of a century. If suits of the character of the present were encouraged, the mischiefs to which it would lead, it may readily be conceived, would indeed be of serious consequence. But fortunately for the peace of society, the well-settled principles of the law, no less than reason, justice, and sound policy, forbid the courts to encourage or countenance, by their sanction, pretensions so adverse to private rights and the public tranquillity.

It is clear beyond controversy that the dividing line or boundary, which it was the professed object of this suit to run and establish, had been run, established, and acquiesced in by those

under whom the plaintiffs-claim long before the institution of this suit; whether actually run and marked in its whole extent from corner to corner is immaterial, as enough was done to enable the parties readily to ascertain where it was intended to run, and must have run had it been extended through. It was well known to the plaintiffs, as is shown by the evidence, which not only disproves the *gravamen* of their complaint and defeated their right of action, but made out and established incontestably the case of the defendants. It results that the verdict of the jury was contrary to law and the evidence, for which the judgment must be reversed.

An examination of the rulings of the court upon the defense of the statute of limitations as applied to the evidence would, it is believed, lead to the same conclusion. But the defendants do not need the aid of the statute to protect their rights, and it would be an unprofitable consumption of time to examine the evidence and the rulings of the court upon that subject.

As the case must be remanded, it is proper to notice a question raised upon the trial and noticed in argument here, upon the admissibility of evidence. The plaintiffs objected to proof of the declarations of Tone, the surveyor, when running the line in 1835, to the effect that he was making the survey to establish the dividing line between the upper and lower halves of the league for the parties, and by their request, as they were dissatisfied with the old line, which it seems had been run in 1832. The bill of exceptions does not state on what ground the evidence was objected to. The objection was overruled, and rightly. If it was intended by the objection that Tone ought to have been produced as a witness, it should have been so stated, and his absence might then have been accounted for. He was a public surveyor, and his declarations while making the survey were clearly admissible as a part of the original *res gestæ*: 1 Greenl. Ev., sec. 145, note. On these questions of boundary, the courts have gone much further, and under certain restrictions have freely admitted hearsay evidence to establish old surveys and boundary lines: *Id.*; 1 Phill. Ev., Cowen & Hill's Notes, 186-239; *Blythe v. Sutherland*, 3 McCord, 258. In the last case cited the circuit court rejected the testimony of a witness who detailed the information he had received from the surveyor, as to the situation of the lines, because the surveyor's death had not been proved; but the appellate court held the testimony admissible, and the omission to prove the death of the surveyor appearing to have been inadvertent, they granted a new trial,

with a view that the formality might be supplied. In that case the information was derived from the surveyor after the running of the lines; it was therefore but hearsay, and not, as in this case, a part of the *res gestæ*, which is always admissible, not as secondary but as primary evidence.

The judgment is reversed and the cause remanded.

Reversed and remanded.

ACQUIESCENCE MAY ESTABLISH BOUNDARY LINE, and will at least furnish evidence of an agreement to that effect: See cases cited in note to *Carroway v. Chancey*, 64 Am. Dec. 579; but a mistake as to a boundary line will not be binding upon the party prejudiced, unless possession has been held according to such boundary for the statutory period: See *Id.* Statute of limitations founded on mistake in boundary: See *Sartain v. Hamilton*, 62 Id. 524, and note discussing the subject 527 et seq. The principal case is cited to the point that disputed boundary lines may be settled by the mutual recognition and long acquiescence of the parties concerned, and thus a line that is not the true one may become established: *Smith v. Russell*, 37 Tex. 256; *McArthur v. Henry*, 35 Id. 816, 817. And the fact that they derive their titles from the same source gives additional force to the doctrine: *Id.* On the question of the locality of a boundary, the acquiescence of the parties in, or their recognition of, a particular line is evidence which should have great weight in determining their boundary, affording as it does a strong presumption that the line so recognized is the correct line, which presumption is strengthened by lapse of time, though no definite time is fixed when the presumption becomes conclusive: *Floyd v. Rice*, 28 Id. 344, citing the principal case.

ARTIFICIAL OR NATURAL BOUNDARIES PREVAIL OVER COURSES AND DISTANCES: *Riley v. Griffin*, 60 Am. Dec. 729, note 731, citing prior cases.

MARKED TREES ON LINE ACTUALLY RUN AND MARKED CONTROL LINE WHICH COURSES AND DISTANCES INDICATE: *Riley v. Griffin*, 60 Am. Dec. 726; *Griffin v. Bixby*, 37 Id. 225; note to *Heaton v. Hodges*, 30 Id. 738; contra: *Wynne v. Alexander*, 47 Id. 326; see also cases on boundaries collected in note to *Newman v. Foster*, 34 Id. 105. Course of a stream called for in the deed will control a marked line along the stream, the former being the prevailing boundary: *Lynch v. Allen*, 32 Id. 671. Where lines of a survey have been run, and can be found, they constitute the true boundaries, which must not be departed from or made to yield to course and distance or to any less certain and definite matter of description or identity: *Colton v. Lann*, 16 Tex. 112; *Dalby v. Booth*, Id. 565; *Anderson v. Stamps*, 19 Id. 464; *Browning v. Atkinson*, 46 Id. 608, citing the principal case. The location of the lines of a survey is to be determined by the lines actually run upon the ground, where these can be ascertained; nor will this rule be varied by the fact that an adherence to it would give to the locator less land than he was entitled to by his certificate: *Burnett v. Burriess*, 39 Id. 504. It is erroneous to make a call for a corner which has not been found the controlling call when established lines and corners of the surveys, actually traced on the ground, are found to correspond with the calls of the deed: *Bass v. Mitchell*, 22 Id. 244. But where the grant calls for certain known and established natural and artificial monuments and boundaries, these may not be controlled by parol proof of a survey entirely inconsistent, and repugnant to all the calls of the grant: *As-*

derson v. Stamps, 19 Id. 460, 464. The above Texas cases cite the principal case.

DIRECT LINE IS IMPLIED BY CALL FOR LINE BETWEEN TERMINI, when nothing in the description signifies the contrary: *Carroway v. Chancey*, 64 Am. Dec. 577, and cases cited in note 579; *Wynne v. Alexander*, 47 Id. 326, note 327.

Lines must be followed as actually marked, whether the deed refer for its boundaries to marked lines or monuments, or they be afterwards marked or established by the parties: *Browning v. Atkinson*, 46 Tex. 608, citing the principal case; note to *Heaton v. Hodges*, 30 Am. Dec. 738.

Line marked part of way, though not right line from corner to corner, will control boundary, and such boundary, for the residue of the distance, will be a direct line to the corner or point of intersection called for: Note to *Heaton v. Hodges*, 30 Am. Dec. 738. In *Thornberry v. Churchill*, 16 Id. 125, it is held that the line marked for a part of the distance must be followed in the same direction for the whole distance unless there is some marked corner to divert it.

DECLARATIONS AND HEARSAY EVIDENCE TO PROVE BOUNDARIES: See *Riley v. Griffin*, 60 Am. Dec. 726; *Chapman v. Twitchell*, 58 Id. 773; *Martin v. Atkinson*, 50 Id. 403; *Wynne v. Alexander*, 47 Id. 326; *Pike v. Hayes*, 40 Id. 171; *Brewer v. Boston etc. R. R. Co.*, 39 Id. 694; *Newman v. Foster*, 34 Id. 98, and cases cited in the note 105. On questions of boundary, declarations of deceased persons who were in a situation to possess information on the subject, and who were not interested, are admissible in evidence even when the declarations were not part of the original *res gestæ*: *Stroud v. Springfield*, 28 Tex. 665, citing the principal case. In questions of private boundary, the declaration of a deceased person of facts occurring in the past, as distinguished from reputation, is not admissible unless it be shown that he had knowledge whereof he spoke, and was then on the land or in possession of it, and was pointing out and marking the boundary or discharging some duty in relation thereto: *Hunnicut v. Peyton*, 102 U. S. 365, citing the principal case upon the admissibility of the declarations of a public surveyor as the leading case in Texas upon this subject.

JURISDICTION IN CASES OF CONFUSED BOUNDARIES WILL BE ENTERTAINED BY EQUITY only where there is some equity superinduced by the acts of the parties, such as fraud, negligence, omission, or misconduct: *Doggett v. Hart*, 58 Am. Dec. 464; *Hough v. Martin*, 34 Id. 403; see *Newman v. Foster*, Id. 98, note 105.

FORMAL DEFECTS ARE NOT REACHED BY GENERAL DEMURRER: *Cunningham v. Smith*, 60 Am. Dec. 333, note 335; *Coffin v. Knott*, 52 Id. 537.

OBJECTIONS TO EVIDENCES SHOULD STATE GROUNDS THEREOF: *McCartney v. Shepard*, 64 Am. Dec. 250, and cases cited in the note 254.

THE PRINCIPAL CASE IS CITED also as one of the cases in Texas settling the law of boundaries: *Stroud v. Springfield*, 28 Tex. 674. In *Spence v. McGowan*, 53 Id. 37, it was said, citing the principal case, that though the location of a disputed line between adjacent surveys may be determined in an action of trespass to try title, yet when the sole object of the suit is to determine the location of the line, and there is no question as to the title to either survey, the parties, under the former statute, would be entitled to but one adjudication on the question: Id.

SMITH v. STRAHAN.

[16 TEXAS, 314.]

TRUST OF LEGAL ESTATE RESULTS TO ONE WHO ADVANCES PURCHASE MONEY, whether title be taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successively.

PURCHASE OF LAND BY PARENT IN NAME OF CHILD IS PRIMA FACIE ADVANCEMENT, so as to rebut presumption of a trust resulting for the parent.

PURCHASE OF LAND BY HUSBAND IN NAME OF WIFE IS PRESUMED TO BE MADE FOR HER BENEFIT; and the presumption of a resulting trust in the one advancing the purchase money is not raised in such a case.

PRESUMPTION OF RESULTING TRUST IN ONE ADVANCING PURCHASE MONEY OF LAND, when the deed is taken in the name of a stranger, may be rebutted, likewise as it is raised, by parol evidence.

PRESUMPTION OF ADVANCEMENT, WHEN DEED TAKEN IN NAME OF WIFE OR CHILD, may be rebutted by evidence showing that the purchase was intended for the benefit of the husband or parent who advanced the purchase money.

PRESUMPTION IN FAVOR OF ADVANCEMENT WHERE DEED IS IN WIFE'S NAME, though the purchase money is advanced by the husband, is not strengthened in Texas, as at the common law, by the rule that a wife cannot be a trustee for the husband, for this principle has little or no force in Texas.

REALTY HELD IN WIFE'S NAME MAY BE SHOWN TO BE INTENDED FOR BENEFIT OF HUSBAND in a state where the fundamental principle of the marital relation is that whatever may be the unity of persons there is no unity of estates, for under such law there can be no such rule as that the wife cannot be trustee for the husband in any sense which would preclude such evidence.

PRESUMPTION THAT LAND PURCHASED BY HUSBAND IN WIFE'S NAME IS INTENDED AS PROVISION FOR HER prevails in Texas, as well as elsewhere, where the rights of the wife are not so much favored.

PRESUMPTION THAT LAND PURCHASED BY HUSBAND IN WIFE'S NAME IS INTENDED TO BE HERS is more easily rebutted in a state where the rights of the wife are favored than under laws which give her no interest in the community property, and a very restricted right to separate estate.

INTENTION OF HUSBAND IN TAKING CONVEYANCE OF COMMUNITY PROPERTY IN NAME OF WIFE has no effect upon either his own or his wife's rights; for whether taken in his own or his wife's name, or jointly, the community character of the property is not changed.

INTENTION OF PARTIES AT TIME OF EXECUTION OF DEED OF LAND IN WIFE'S NAME, where purchase money is advanced out of husband's separate property, determines whether the purchase is for the benefit of the husband or wife, and this intention may be gathered from antecedent or concomitant acts and declarations of the husband.

SUBSEQUENT ACTS AND DECLARATIONS OF HUSBAND ARE AS INEFFECTUAL AGAINST WIFE as they are in case of a parent against a child to rebut the presumption that a purchase of land by a husband or father in the name

of a wife or child was intended for the benefit of the wife or child; but the fact of a husband or parent, even when children are minors, going immediately into possession after such purchase, and always claiming and holding such lands as his own, would, however, be some, though by no means conclusive, evidence of his original intention to make the purchase in trust for himself, and not an advancement.

Surr for partition of land among the heirs of the deceased wife of the defendant, one of whom, a daughter, had been married by the plaintiff Smith, and had since died, leaving a child, since deceased. The other heirs were three other children of the defendant and his deceased wife. They had been made defendants, and now joined in the plaintiff's prayer for partition. Strahan, the defendant, alleged that although the deed for the land had been taken in his wife's name, it had been paid for out of his separate property, pleaded the statute of limitations, alleged a settlement of the plaintiff's claim by an instrument transferring to himself the whole interest of the plaintiff and his wife in the land in controversy for one hundred and fifty dollars, and set out improvement to the value of about seven thousand dollars. The jury found a special verdict upon the issues submitted, finding, *inter alia*, that the land was paid for out of the defendant's separate property, and that the deed to his wife by the former owners of the land did not constitute a gift or dedication to her from the defendant; also that the possession of the defendant commenced in 1844 and continued until the present time, 1853, and was adverse to all others. Upon this verdict judgment was rendered for the defendant and title was confirmed in him. Motion for a new trial was overruled and error was assigned. The evidence was doubtful, upon the intention of the defendant in taking the deed in the name of his wife, as to the execution and intended effect of the instrument from the plaintiff and wife to the defendant, and as to the adverse possession of the defendant. The plaintiff requested the instruction that the deed to the defendant's wife, though the purchase money was the defendant's separate property, raised the presumption that the land was given by the defendant to his wife. The instruction was refused, and the plaintiff excepted.

J. H. Robson, for the plaintiffs in error.

G. W. Smith, for the defendant in error.

By Court, HEMPHILL, C. J. It is a general rule that the trust of a legal estate, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the

purchaser, whether in one name or several, whether jointly or successively, results to the one who advances the purchase money; and this is in strict analogy to the rule of the common law, that where a feoffment was made without consideration the use resulted to the feoffor: 2 Story's Eq. Jur., sec. 1201; *Dyer v. Dyer*, 2 Cox, 92; 1 Lead. Cas. Eq. 188.

But there are exceptions to this rule as well established as the rule itself. For example: a purchase by a parent in the name of a child is deemed, *prima facie*, an advancement for the child, so as to rebut the presumption of a trust resulting for the parent: 2 Story's Eq. Jur., sec. 1202, and the authorities above cited. The moral obligation of the parent to provide for his children is said to be the foundation of this exception; and it is but a reasonable presumption that a purchase by a parent in the name of a child is for the benefit of the latter in discharge of this obligation, and also as a token of his natural love and affection. And a like presumption exists also in the case of a purchase by a husband in the name of the wife; and it is said that the presumption is stronger in case of a wife than of a child, for at law she cannot be the trustee of her husband: 2 Story's Eq. Jur., sec. 1204; *Kingdon v. Bridges*, 2 Vern. 67; *Christ's Hospital v. Budgin*, Id. 683; *Rider v. Kidder*, 10 Ves. 360; Hill on Trustees, 135; Dart on Vendors, 437; *Guthrie v. Gardner*, 19 Wend. 414; *Whitten v. Whitten*, 3 Cush. 194-197; *Jencks v. Alexander*, 11 Paige, 619; *Dummer v. Pitcher*, 2 Myl. & K. 262.

The presumption of trust, when the purchase is taken in the name of a stranger, as it is raised so it may be rebutted, by parol evidence; and the presumption of an advancement, when taken in the name of a wife or child, may also be rebutted by evidence showing that the purchase was intended for the benefit of the husband or parent who advanced the purchase money.

It was said in the case of *Kingdon v. Bridges*, *supra* (as a reason why a purchase by a husband in the name of a wife should be for her benefit), that a wife could not be a trustee for the husband, and this is cited by later authorities as a circumstance which increases the force of the presumption in favor of the wife over that of a child. But this principle has little or no force under our system of laws and of marital rights. The right of the wife under our laws to hold property is coequal with that of the husband, and upon evidence it may be shown that property in the name of one is really held for the benefit of the other. It is very true that the wife is under the burden, or as the law intends, under the protection, of some legal disabili-

ties even with reference to her separate property; but these have reference to the mode of alienation, and not to any claim of the husband over such property *jure uxoris*, for he has none except that of management and its incidents. At all events, where the fundamental principle of the marital relation is, that whatever may be the unity of persons, there is no unity of estates, there can be no such rule as that the wife cannot be a trustee for the husband in any sense which would preclude evidence showing that although property is in her name it was intended for the benefit of the husband.

The rational foundation for the presumption in favor of the wife is, that the purchase is intended as a provision for her; and this presumption will hold as well under our system as in others where the rights of the wife are not so much favored. It may, and would under the operation of our laws, be generally more easily rebutted than it would be where the wife has no interest in community property and a very restricted right to separate estate. The necessity for a provision would not so often exist in this state, as in others, where by operation of law the great proportion of the wife's property is absorbed by the husband. But the necessity might and would often exist in fact. The property of the wife might not be large, or in proportion to her condition and situation in life; and in fact, though eminent advantages are afforded the wife by our laws, yet her condition is not so much changed as to repel the presumption of benefit from a purchase made by a husband in her name out of his own separate funds. The legal effect and operation of the deed is to vest the property in the wife. This effect would be rebutted in case a stranger were the nominee in the purchase. But the wife is not as a stranger to the husband. She has distinct rights and a separate estate, but he is bound for her support and maintenance, not only by law, but from the impulses of affection; and a conveyance to her, when the purchase money is advanced by himself, is not to be presumed *prima facie* an arrangement for his convenience, but as importing to the wife a substantial benefit, and vesting in her the whole interest, as well legal as beneficial.

This is but a presumption, and may be rebutted by evidence; but the wife and her privies are entitled to the benefit of this presumption; and the court erred in refusing to instruct the jury that such was the inference of the law.

There is a material distinction between the inferences to be drawn as to the effect of the act of the husband in his purchase

of property in the name of the wife with community funds, and in his purchase in her name with his own property. The law regulating ganancial property prescribes the effect of purchase in the name of the wife, and makes it precisely the same as if purchased in the name of the husband. The definition of community property includes all effects which husband and wife, during marriage, acquire by a common title, either lucrative or onerous, or which they, or either of them, acquire by purchase, or through their labor or industry. The intention of the husband, in taking the conveyance of community property in the name of his wife, has no effect upon either his own or the rights of the wife. The law prescribes the operation of such deed, irrespective of the motives in taking it, in either the name of the husband or of the wife, or of both jointly; for whether taken in the one form or the other, the community character of the property is not changed. But there is no such rule in reference to their separate estates, and it could not be applied to them without producing much embarrassment and confusion. The law having attached no uniform operation to a purchase by a husband out of his separate funds in the name of the wife, the question of intention of the husband in so taking the deed becomes of paramount importance, for upon that depends its operation. The inference of law is that by such act he intended an advancement or provision for the wife. And we will now consider whether, in this case, there was any sufficient evidence to rebut this presumption, and raise the influence of resulting trust to the husband.

Questions of this character have arisen more frequently in cases where the purchase is in the name of a child by a father than in the wife's name by a husband, and many circumstances have been taken into consideration, as rebutting the presumption of an advancement for a child, which have given rise to many nice distinctions, not easy to be understood, most of which are, however, now disregarded; thus, at one time it was thought that the infancy of a child, in whose name a purchase was made, was a circumstance against it being considered an advancement, though it is now regarded as a strong circumstance to the contrary: 1 Lead. Cas. Eq. 196; *Dyer v. Dyer*, 2 Cox, 92; *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

From this it appears that there has been fluctuation as to the circumstances in support or rebuttal of presumptions of the intention of parties, when this intention depends on matters in parol, and is not fixed conclusively by the deed. The facts in this case adduced to rebut the influence of advancement are

not only meager, but appear to be inconclusive, though if the jury had been properly instructed much weight should have been allowed the verdict even upon this evidence. The intention of the parties at the time of the execution of the deed is to determine its complexion and character; and antecedent or concomitant acts and declarations of the husband are to be regarded as parts of the transaction, and as evidence of his intention whether the purchase should be for the benefit of the wife or of his own: *Grey v. Grey*, 2 Swanst. 594; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Partridge v. Havens*, 10 Paige, 618-626; *Murless v. Franklin*, 1 Swanst. 17-19. But in case of purchase in the name of a child, it is said that subsequent acts or declarations of the father will not be admissible to rebut the presumption of advancement. Thus a subsequent devise of the property by the father, *Mumma v. Mumma*, 2 Vern. 19; *Crabb v. Crabb*, 1 Myl. & K. 511, or a mortgage, will be ineffectual: *Sidmouth v. Sidmouth*, 2 Beav. 454; *Finch v. Finch*, 15 Ves. 51. And the case of a child, especially of a minor, by the entering into possession and taking the rents and profits of the purchased property, the presumption of advancement will not be rebutted, as the acts of the father may be referable to his duty as guardian of his children: *Loyd v. Read*, 1 P. Wms. 608; *Dyer v. Dyer*, 2 Cox, 92.

All such acts and declarations by a husband are as ineffectual against the wife as they are against a child. The law vests the management of the wife's lands and slaves in the husband, and his possession or cultivation and improvement of her lands cannot avail, or at least is by no means conclusive, against her rights. The fact of a husband or parent, even when children are minors, going immediately into possession after such purchase, and always claiming and holding the lands as his own, would, however, it seems to me, be some, though by no means conclusive, evidence of his original intention that the purchase was in trust for himself, and not an advancement: *Dyer v. Dyer*, 2 Cox, 92. It is only as indicative of original intention that such possession, unless long continued, could be made available; for coverture and minority would protect the wife and infants against the claim of adverse possession. There is no proof of any declarations or acts on the part of the wife; and the declarations of the husband, claiming the property as his own, are not proved by the witness Kelch to be contemporaneous with the execution of the deed. The deed was attested by two witnesses, one of them of the same name with the witness on the trial.

Its execution was acknowledged, and it has been recorded, though the date is not shown.

It appears, also, that one of the minor daughters, after marriage, claimed a share in the land; and upon the whole, there was but slight ground for the verdict of the jury; and which, had they been properly instructed as to the force of the presumption for the wife, would most probably have been deemed by them as insufficient.

In the course of the trial the following instrument was offered in evidence by the defendant, as one executed by the plaintiff for himself and wife, viz.:

“ Know all men by these presents, that I this day bargain and sell to William H. Strahan my interest in the tract of land that he is now living on in Reel’s Bend, for one hundred and fifty dollars, having giving his note for the same, this twentieth March, 1849.

“ Witness my hand and seal.

(Signed)

“ WATKINS L. SMITH. [L. s.]

“ SARAH F. SMITH. [L. s.] ”

But although much evidence was offered as to the execution of this instrument, and the jury found that it was signed by Smith, the plaintiff, for himself and wife, yet no question has been made upon it in argument before this court, although the finding of the jury as to its execution has been assigned as contrary to evidence.

Without argument, we forbear the discussion of the important question how far even the wife might be concluded in equity by an arrangement for the settlement of family disputes, or for the partition of an estate upon a reasonable consideration, even where the mode of assurance is not sufficient in law to convey the interest of the wife. In *Hartwell v. Jackson*, 7 Tex. 576, it will be seen that after the institution of suit agreements by way of compromise, signed by the husbands alone, will bind the wives, though neither signed nor acknowledged by the wives. But no question seems to have been made on this point below, and the instrument is stated in the argument of appellee to have been relied on by way of estoppel as against the husband alone. This presents a very important question, but upon which, as there has been no argument, it will not be necessary to express a decisive opinion.

The judgment is ordered to be reversed, and the cause remanded for a new trial.

Reversed and remanded.

RESULTING TRUST, WHERE PURCHASE PRICE OF LAND IS PAID BY ONE AND TITLE IS TAKEN IN ANOTHER'S NAME: See *Irwin v. Ivers*, 63 Am. Dec. 420, and cases cited in the note 424.

ADVANCEMENT TO WIFE WILL BE PRESUMED, WHERE HUSBAND PAYS FOR LAND and directs conveyance to be made to her, in the absence of his manifestation of a contrary intention: *Spring v. Hight*, 39 Am. Dec. 587; see *Warren v. Brown*, 57 Id. 191, and note 194 et seq., discussing the effect of a purchase by and deed to a married woman. When a deed for land purchased with the separate property of the husband is taken in the wife's name, the presumption arises that it was a gift from him to her so as to make it her separate property: *Baldrige v. Scott*, 48 Tex. 189; though the presumption may be rebutted: *Wormley v. Wormley*, 98 Ill. 553; *Peck v. Vandenberg*, 30 Cal. 39. It is a question of intention on the part of the husband in so taking the deed: Id. 41. A deed to the wife from a third person may be shown to be in reality a gift from the husband: Id. 54. The above cases cite the principal case.

LAND PURCHASED WITH COMMUNITY PROPERTY AND DEED TAKEN IN WIFE'S NAME.—When a deed for land purchased with the separate property of the husband is taken in the wife's name, it is presumably an advancement to the wife. But if the purchase is made with community property, it presumably remains community property, though this presumption may be rebutted by showing that the husband intended the land as a gift to the wife; and the expressions of opinion in the principal case to the effect that the motives of the husband in purchasing land with community property cannot change the land purchased from community property are, as far as they are in conflict with this decision, overruled: *Higgins v. Johnson*, 20 Tex. 393, 397. Although, as between parties to the deed in the wife's name, the consideration of which is community property, and their privies or vendees without value or with notice, the legal import of the deed may be changed, and the land may be shown to be the separate property of the wife; yet parol evidence cannot be introduced to this effect so as to ingraft upon the property, after it has passed to innocent purchasers from the husband, a trust to their detriment: *Cooke v. Bremond*, 27 Tex. 460. Land purchased with community property, and the deed taken in name of the wife, may be shown by parol to be intended as the separate property of the wife: *Peck v. Brummagin*, 31 Cal. 447. The foregoing cases cite the principal case.

GIFTS AND CONVEYANCES BY HUSBAND TO WIFE will be supported in equity against himself and his representatives: *Garner v. Garner*, 57 Am. Dec. 583, note 585; *Shepard v. Shepard*, 11 Id. 396. A husband cannot grant anything to his wife: *People v. Mercien*, 38 Id. 644. A freehold estate cannot be granted by a husband to his wife to vest in her after his death: *Benedict v. Montgomery*, 42 Id. 230; see also *Fisk v. Cushman*, 52 Id. 761, and note. A deed from a husband directly to his wife is void at law: *Shepard v. Shepard*, 11 Id. 396. But the conveyance may be made effectual by the intervention of a trustee: *Spring v. Hight*, 39 Id. 587. The principal case is cited to the point that under enabling statutes similar to those under which the principal case was decided a husband may make a gift or grant of property to his wife by conveyance to her directly, without the intervention of trustees: *Story v. Marshall*, 24 Tex. 307; *Peck v. Vandenberg*, 30 Cal. 46. The husband, when free from debts, may make a gift to the wife out of the community property: *Peck v. Brummagin*, 31 Id. 447. The *prima facie* presumption arising from a deed of the husband to his wife of community property is that it was intended to change its character from community property to separate property

of the wife; and a subsequent sale of the property by the husband does not rebut this presumption; and the deed is effectual against such subsequent purchaser: *Story v. Marshall*, 24 Tex. 308.

PURCHASE BY PARENT IN CHILD'S NAME IS PRESUMED TO BE ADVANCEMENT: *Listoff v. Hart*, 57 Am. Dec. 203; *Phillips v. Gregg*, 36 Id. 158, note 166; *Dudley v. Bosworth*, 51 Id. 690. But otherwise in case of brothers: *Smitheal v. Gray*, 34 Id. 664.

CHARACTER OF TRANSACTION AT ITS INCEPTION DETERMINES WHETHER ADVANCEMENT or resulting trust is created by purchase by one person when the deed is taken in another's name: *Dudley v. Bosworth*, 51 Am. Dec. 690.

RESULTING TRUST, AS IT MAY BE ESTABLISHED, MAY ALSO BE CONTRADICTED BY PAROL: *Strimpfler v. Roberts*, 57 Am. Dec. 606; *Baker v. Vining*, 50 Id. 617; *Dudley v. Bosworth*, 51 Id. 690.

HYDE v. STATE.

[16 TEXAS, 445.]

RULES GOVERNING APPLICATIONS FOR CONTINUANCE OF CAUSES are, in general, the same, both in civil and criminal cases, though in the latter the matter is to be scanned more closely.

CONTINUANCE OF CAUSE IS MATTER OF RIGHT WHEN AFFIDAVIT THEREFOR CONFORMS TO STATUTE, and want of proper diligence cannot be imputed, and there is no cause to suspect that the application is for delay.

COUNTER-AFFIDAVITS TO SHOW WANT OF DILIGENCE AND IMPROBABILITY OF ANY REASONABLE EXPECTATION that the proposed testimony can be obtained at all, or at the time to which it is proposed to postpone the trial, may be received on application for a continuance of a cause for the purpose of the production of evidence.

IN ADMINISTRATION OF CRIMINAL LAW IN TEXAS, COMMON LAW, where not modified by the constitution or statutes, furnishes the rule of decision, as well in matters of practice as principle; though a departure from the common-law system of pleading has caused a corresponding departure from the common-law practice in civil cases.

TO ENTITLE PARTY TO POSTPONEMENT OF TRIAL ON GROUND OF ABSENCE OF WITNESSES, three things are necessary: 1. To satisfy the court that the persons are material witnesses; 2. To show that the party applying has been guilty of no laches nor neglect; 3. To satisfy the court that there is reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off.

AFFIDAVIT ON SECOND APPLICATION FOR CONTINUANCE ON GROUND OF ABSENCE OF WITNESSES, after one continuance granted for the same cause, should be more explicit, and show what are the facts of the case, and what means of information applicant's witnesses possess; and if the second affidavit is less full, this may furnish ground to suspect that the object was delay.

FACT THAT WITNESSES ARE BEYOND LIMITS OF STATE is not good ground for continuance, when the defendant has had time to prepare his defense.

MOTION FOR CONTINUANCE ON GROUND OF ABSENCE OF WITNESSES should not be refused because adverse party admits that the witnesses, if present,

would testify as stated in defendant's affidavit; but notwithstanding this admission, the refusal of the motion will not be error if based upon a well-founded doubt of the verity of the affidavit itself, and a belief that the application was for delay.

EVIDENCE PRODUCED AT TRIAL WILL BE CONSIDERED IN REVIEWING REFUSAL TO GRANT CONTINUANCE, when, upon appeal, a motion for a new trial brings before the court a statement of the evidence; and if from such evidence there appears a cause to apprehend that a continuance was improperly refused, a new trial must be granted; but if it appears that the application for a continuance could not have been well founded in fact, it affords an additional reason for refusing a new trial or a reversal of the judgment on that ground.

IT IS GOOD CHALLENGE TO JUROR, FOR CAUSE, ON PART OF STATE, that he has conscientious scruples against finding a verdict of guilty where the punishment is death

INDICTMENT for murder. The principal question involved is the refusal of an application for a continuance. The defendant moved for a second continuance, on the ground of the absence of certain witnesses, Milly Hyde, Newton Hyde, and Jasper Hyde, and E. A. Fogle. He alleged in his affidavit due diligence in causing subpoenas to issue against them; that Milly Hyde had been served, but no return of service had been made of the subpoenas against Newton and Jasper Hyde. He referred to the papers in the case, and to his former affidavit, and made the same a part of this affidavit. He asked for attachments to enforce the attendance of Milly Hyde and the other witnesses. He alleged that the subpoenas were issued to the sheriff of Travis county, where Milly resides, and where Jasper and Newton resided, as defendant had no doubt. No subpoena had issued against E. A. Fogle, but she was on her way to attend the trial. He stated that he expected to prove by these witnesses that "he did not kill the said Butler, but that it was his brother, Benjamin Hyde, who killed him." The affidavit for the former continuance, which was granted, was for the absence of the same witnesses, with the exception of E. A. Fogle, and stated that subpoenas had issued to Bastrop county for Newton and Jasper Hyde, and to Austin county for Milly Hyde. This affidavit stated somewhat more fully what the defendant expected to prove by these witnesses. The attorney for the state proposed a counter-affidavit by Joseph J. Young; and also proposed to admit that Milly Hyde, the only witness the defendant had subpoenaed, would, if present, testify to the facts alleged in the defendant's affidavit. Defendant's objection to the hearing or receiving of this counter-affidavit was overruled, and the affidavit was heard. It stated that the affiant had made diligent

search in Bastrop and Travis counties for Jasper and Newton Hyde, and ascertained by inquiry that two boys bearing those names had formerly been there. Their step-mother said that she was told that a man came to the place where they were living and removed them to parts unknown; and it was her opinion and that of the neighbors that they had been removed to Arkansas. These boys were the reputed children of Benjamin Hyde, the defendant's brother, and Milly Hyde was their step-mother. The affiant endeavored to procure the attendance of Milly Hyde, but she refused, alleging that all she knew was against the defendant, and she feared if she testified to this, and the defendant should be acquitted, he would take her life. The court, after considering the affidavits of the defendant, the counter-affidavits, the record in the case, and all the circumstances thereof, and also the admission of the facts to be proved by Milly Hyde, overruled the motion for a continuance, on the ground that it was not satisfied of the truth of the defendant's averments, that due diligence did not appear to have been used to procure the attendance of the witnesses, and there seemed to be no reasonable ground to expect their attendance at another term. To this ruling defendant excepted. Exception was also taken to the allowance of a challenge for cause to five of the jurors on the ground that they answered on the *voir dire* that they had conscientious scruples against finding a verdict of guilty where the punishment was death. At the trial the testimony of three persons present, besides other evidence, showed quite clearly the guilt of the defendant.

J. W. Henderson and C. B. Sabin, for the appellant.

Thomas J. Jennings, attorney general, for the appellee.

By Court, WHEELER, J. The rules governing applications for the continuance of causes are, in general, the same both in civil and criminal cases: *Rex v. D'Eon*, 1 W. Black. 515; S. C., 3 Burr. 1514; *State v. Lewis*, 1 Bay, 1, 2; *People v. Vermilyea*, 7 Cow. 369. The statutory provisions on the subject do not seem to be materially variant: Hart's Dig., art. 815; Laws 5th Legis., p. 72, sec. 85. "The rule," said Sutherland, J., in *People v. Vermilyea*, *supra*, "is substantially the same in civil and criminal cases; though in the latter the authorities all agree that the matter is to be scanned more closely, on account of the superior temptation to delay and escape the sentence of the law. . . . In cases where the common affidavit applies, the court has no discretion. The postponement is a matter of right, resting on what has be-

come a principle of the common law. But where there has been laches, or there is reason to suspect that the object is delay, the judge at the circuit may then take into consideration all the circumstances, and grant or delay the application at his pleasure. Where the subject takes this turn, the application ceases to be a matter of right, and rests in discretion." This doctrine seems to be borne out by the authorities: 2 Phill. Ev., Cowen & Hill's Notes, 358. What was said by the learned judge of the common affidavit applies to the affidavit prescribed by the statute. Where the want of proper diligence cannot be imputed, and there is no cause to suspect that the application is for delay, if the affidavit conforms to the statute, the continuance is a matter of right; and its refusal will be error. But it is otherwise where it appears that the affidavit is not true in fact, or there is reason to believe that the object of the application is delay: See late cases at Tyler, and at this term. It is the well-settled rule of practice of the common law that counter-affidavits will be received to destroy the force of the common affidavit. In the leading case of *Rex v. D'Eon*, 3 Burr. 1513, S. C., 1 W. Black. 510, the issue was on information for a libel, and in reply to the common affidavit of the absence of witnesses in France, the prosecutor showed by counter-affidavits that the libel was printed in the spring of 1764, several months before which the witnesses named had departed to France, where they resided. The court held that there could be no use in putting off the trial; that on the whole, comparing the libel and affidavits, the witnesses could not be material. The defendant had made no effort to procure their attendance, and there was no reasonable expectation that they could be obtained thereafter. The court considered either cause sufficient against the rule to postpone the trial. These causes, neglect and improbability of obtaining the attendance of the witnesses, have been recognized as the subject of counter-affidavits in subsequent cases. But affidavits to contradict the general oath of materiality seem not to have been often received: 2 Phill. Ev., Cowen & Hill's Notes, 685, and cases cited. There is no doubt that since D'Eon's case, it has been the settled common-law practice to receive counter-affidavits to show want of diligence and improbability of any reasonable expectation that the proposed testimony can be obtained at all or at the time to which it is proposed to postpone the trial. Such, too, is the practice in some, probably most, of the courts of this country: *Smith's Case*, 3 Wheel. Cr. Cas. 172, 176; *People v. Brigham*, 1 City Hall Rec. 30; *Territory v. Nugent*, 1 Mart. (La.) 108;

Anonymous, 3 Day, 308. In criminal cases especially we look to the common law for the rule of practice in the absence of statutes. Our departure from the common-law system of pleadings, and blending of cases of legal and equitable cognizance, has caused a corresponding departure from the common-law practice in civil cases. Not so in criminal. In the administration of the criminal law, the common law, where not modified by the constitution or statutes, has been held to furnish the rule of decision as well in matters of practice as principle. There we find ample authority for the practice of receiving counter-affidavits in cases like the present. There was, therefore, no error in receiving the counter-affidavit. The weight to be attached to it, or its credibility, was for the decision of the judge below. Unless there were reason to believe that he had attached an undue weight to it, his having entertained it cannot be deemed erroneous.

The question then is, whether upon the affidavits the defendant was entitled to a continuance. We cannot say that he was. In the case of *Rex v. D'Eon*, before cited, the principles upon which the courts are to act in postponing the trial of a cause, on account of the absence of witnesses, are clearly laid down, and have since been received as the settled law in the English and American courts. To entitle the party to a postponement of the trial, three things are necessary: "1. To satisfy the court that the persons are material witnesses; 2. To show that the party applying has been guilty of no laches nor neglect; 3. To satisfy the court that there is reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off:" 3 Burr. 1514, 1515. This was a second application for a continuance for the same cause as the first. Instead of being more explicit, and showing what were the facts of the case, and what means of information his witnesses possessed, as might have been expected if the defendant really believed the witnesses were material to his defense, and that their testimony would be favorable to him, and as has been generally held to be necessary after the trial has been postponed, at the instance of the defendant, once or oftener: *Rex v. Jones*, 8 East, 31, 34; *Hooker v. Rogers*, 6 Cow. 577; the affidavit is less full and circumstantial than the first, stating only in general terms "that he did not kill the said Butler, but that it was his brother Benjamin Hyde who killed him." It must be admitted that this is not a very satisfactory statement of the particular facts proposed to be proved by the witnesses. It is silent as to their means of

information, and the occasion and circumstances of the homicide; and certainly does not contain what the statute seems to contemplate, or what has generally been required in such cases: *Lord v. Cooke*, 1 W. Black. 436; *People v. Vermilyea*, 7 Cow. 385; *Owens v. Starr*, 2 Litt. 230. When the subject of the proof and the relations of the parties are considered, it cannot be denied that there was reason to suspect that the object was delay. Where that is the case, all the authorities hold that the application ceases to be a matter of right, but the judge is to take into consideration all the circumstances, and grant or deny the application as the truth and justice of the case may seem to require: *Rex v. D'Eon*, 3 Burr. 1514. Many cases might be cited where a postponement has been held rightly refused on this ground, where the affidavit was quite as full, and more full and satisfactory than the present: *Moore's Case*, 9 Leigh, 643, 644; *Bledsoe v. Commonwealth*, 6 Rand. 673; *Bellew v. State*, 5 Humph. 567; *Knight v. State*, Id. 599; Whart. Crim. L., tit. Motion for Continuance. Where there is cause to suspect that the object is delay, it is then proper to receive counter-affidavits; and looking to the counter-affidavit in this case, we think the court was well warranted in not giving credit to the affidavit of the defendant.

As respects the witnesses who were beyond the limits of the state, the observations of Brevard, J., in *State v. Files*, 3 Brev. 304, may be quoted as applicable to this case. "My opinion," he said, "is that this motion ought to be rejected. On the argument, the only ground insisted on was the refusal of the court of general sessions for Newberry district to postpone the trial, on affidavits which stated the absence of material witnesses for the prisoner, who were beyond the limits of the state. If trials for capital offenses should be postponed on affidavits of this sort, very few cases would ever be tried at all, and none at the first court after the arrest of the offender unless he should be willing. Affidavits of this kind ought very sparingly to be admitted. For, in circuit trials, the prisoners, from the time of their commitment, may and ought to be preparing for their defense. The place where they ought to be tried is, in most cases, well known, and they have likewise a reasonable certainty of the time long before the circuit commences. If the prisoner has had no time or opportunity to prepare for his defense, this will be a good ground for postponement. It must be admitted that no crime is so great, no proceeding so instantaneous, but that upon sufficient grounds the trial may be put off; but three things are neces-

sary: 1. That the witness is really material, and appears to the court so to be; 2. That the party who appears has been guilty of no neglect; 3. That the witness can be had at the time to which the trial is deferred: *Rex v. D'Eon*, 1 W. Black. 515. The witnesses are said to be in Tennessee. No compulsory process can issue to obtain their testimony. The presumption is that they would not attend at another court, or they would have attended at the trial, where the life of the defendant is in jeopardy." Similar reasons would apply to prevent a postponement on account of the witness said to reside in the state, but who could not be found. The only witness on account of whose absence there may be cause to doubt whether the defendant was entitled to a continuance was Milly Hyde, who had been served with a subpoena. She, it seems, was the widow of the defendant's brother, by whom he expects to prove that her deceased husband was the guilty party. To say nothing of the reasonableness of such an expectation, considering the counter-affidavit, it is impossible to say that the court ought to have been satisfied either that the witness was really material to the defendant, or that he could derive any benefit from her testimony at any future time to which the trial might be postponed.

But it is insisted that the court erred in receiving the admissions of the state's attorney, that the witness Milly Hyde would testify as stated by the defendant. If the application for a continuance were otherwise sufficient, and it satisfactorily appeared that the defendant was entitled to a postponement of the trial to obtain her testimony, I should be of opinion that the admission as to what she would testify would not be a sufficient ground for refusing the motion. Upon this point, as to whether any and what admissions will be received as an answer to the motion, there have been various and conflicting decisions: *People v. Vermilyea*, 7 Cow. 369; Whart. Crim. L. 835; *Goodman v. State*, 1 Meigs, 195. I do not think such admissions ought to be received as a full and fair substitute for the oral testimony of the witness. Nor does it appear that the court so regarded the admissions in this case. The continuance does not appear to have been refused on that ground. On the contrary, it was placed by the judge on a quite different ground; that is, that he was not "satisfied that the facts alleged by the defendant were true." In the case of the *People v. Vermilyea*, *supra*, the majority of the court, holding that the admissions were improperly received as an answer to the motion, went on the ground that the application was otherwise sufficient, and was so pro-

nounced by the judge, and that a continuance must and would have been granted but for the admissions: *Per* Woodward, J. So in the case of *Goodman v. State*, *supra*. The court in that case declared themselves of opinion that "the affidavit did contain sufficient grounds for the continuance of the cause." They said, moreover, if the circuit court had refused to continue the cause upon the ground of the insufficiency of the affidavit, they would have hesitated long before they would for that reason have reversed the judgment, notwithstanding their opinion of the sufficiency of the affidavit. "But," they say, "the record manifests that the circuit court thought as we do, that the affidavit was sufficient, and refused to continue the cause, because the attorney general offered to admit, not that the facts stated in the affidavit were true, but that the witnesses there mentioned would, if present, testify as stated by the defendant." This they held was not equivalent to the testimony of the witnesses, and therefore not a sufficient answer to the motion.

The case here was very different. The court deemed the application insufficient; and on that ground, we think rightly, refused the motion. The judge mentions more grounds than one which would have been sufficient to warrant the refusal of the motion; as the want of diligence, or any reasonable ground to expect the attendance of the witnesses at another term of the court. But as it is evident the main ground on which the court acted was the want of verity in the affidavit and the belief that the application was for delay, and as we think this ground well founded and sufficient, it is unnecessary to examine the question of diligence.

It is evident the continuance must have been refused for the other causes stated by the judge. They at least were sufficient to warrant its refusal; and the fact of receiving and considering the admissions can have done the accused no injury, and can be no reason for reversing the judgment.

We conclude, upon that single question, and not looking beyond the application, that the court did not err in refusing a continuance. But in considering the case upon appeal, where the motion for a new trial brings before us a statement of the evidence upon the trial, we do not feel bound to shut our eyes wholly to the facts of the case, in considering whether the judgment ought to be reversed for the refusal of the court to grant a continuance. If upon the trial there had appeared to be cause to apprehend that a continuance was improperly refused, a new trial must have been granted. But if, on the contrary,

it very satisfactorily appears that the application for a continuance could not have been well founded in fact, it must afford an additional reason for refusing a new trial or to reverse the judgment on that ground. We may suppose a case where a sufficient application for a continuance, on account of the absence of a material witness, has been improperly overruled. Yet if it should turn out that, during the progress of the trial, the witness made his appearance and the defendant obtained the benefit of his testimony, it cannot be supposed that the court, upon the motion for a new trial, would not be at liberty to look beyond the affidavit; or that this court, upon appeal, must shut our eyes to the fact that the defendant has had the benefit of the testimony of his witness, and can have sustained no injury by the refusal of his motion for a continuance. Surely, in such a case, this court would not be required to reverse the judgment on that ground. Though we have considered the application for a continuance on its own merits, in the abstract, in order to be certain that no injustice had been done the defendant in refusing his motion, we have thought proper to look into the evidence embodied in the record; and we there find additional cause to be satisfied that the motion was not improperly refused. We forbear comment upon the evidence. It may suffice to say that several witnesses, who were eye-witness of the homicide, had ample means and opportunity of seeing and observing all that passed, and could not be mistaken as to the author of it, testified positively to the fact with such circumstantial particularity, and just such diversity as to immaterial matters which were not likely to make a strong, permanent impression, as to show that there was no collusion; and such perfect unanimity as to the material facts which were calculated to make a strong, abiding impression upon the memory as to show that they were not and could not be mistaken. It thus appears that there were other witnesses than those named in the affidavit by whom all the facts and circumstances attending the fatal scene could be abundantly proved; that the witnesses whose testimony was sought could not, if present, have testified to the truth of the fact proposed to be proved by them; and that the affidavit for a continuance, therefore, was not entitled to credit.

We have thus looked into the evidence upon the motion for a new trial, which necessarily brings it under review; and we advert to it, not as a ground for affirming the judgment of the court refusing a continuance, but as placing it beyond doubt that no injustice can have been done the defendant by refusing

his motion, which was rightly refused on the ground of its want of legal sufficiency.

The only remaining ground on which a reversal is asked is the ruling of the court in excusing persons from serving as jurors whose conscientious scruples in relation to capital punishment were held a sufficient cause for standing them aside on the motion of the district attorney. This question was sufficiently examined in the case of *White v. State*, 16 Tex. 206, at the present term, where it was held that excluding such persons from the jury was not error.

We are of opinion that there was no error in the judgment, and that it be affirmed.

Judgment affirmed.

CONTINUANCE OF CRIMINAL CASE IS DISCRETIONARY: *McFadden v. Commonwealth*, 62 Am. Dec. 308, and cases cited in the note 312. The discretion of the court in ruling upon a motion for a continuance is not an irresponsible one, but must be grounded upon laches or a reason to suspect that the object is delay: *Myers v. State*, 7 Tex. App. 643, 644, citing the principal case.

THREE REQUISITES ARE NECESSARY TO ENTITLE PARTY TO POSTPONEMENT OF TRIAL, as stated in the syllabus. The principal case is cited on this point in *Jackson v. State*, 4 Tex. App. 296, 297. The party moving the continuance of a criminal cause on account of his inability to subpoena witnesses by reason of the recent finding of the bill, and his close confinement since his arrest, must show that he has certain witnesses, giving their names, and must state what he expects to prove by them, in order that the court may determine whether or not the testimony would be material: *Roberts v. State*, 58 Am. Dec. 528.

DUE DILIGENCE IN SEEKING TO OBTAIN PRESENCE OF WITNESS must appear before motion for continuance, on the ground of the absence of a material witness, will be granted: *Hensley v. Lytle*, 55 Am. Dec. 741, and note 743; *Thompson v. Miss. Ins. Co.*, 22 Id. 129. An affidavit for a second continuance of a cause on account of the absence of a material witness, setting out as the diligence used that a subpoena had been issued after the commencement of the term and seven days before the trial, and returned the next day after issued not found, did not show sufficient diligence, notwithstanding it stated in addition that the witness was only temporarily absent without the procurement or consent of the affiant; and that had he known of the witness's intended absence he would have endeavored to have taken his deposition: *Henderson v. State*, 22 Tex. 596, citing the principal case.

COUNTER-AFFIDAVITS IMPEACHING DILIGENCE OF MOVING PARTY MAY BE READ: *Rucker v. State*, 7 Tex. App. 559, citing principal case. Counter-affidavits are admissible on applications for continuances to show want of diligence on the part of the applicant, or that the testimony cannot be obtained, and the code has not changed the rule since the decision of the principal case: *Murry v. State*, 1 Id. 178, 179.

ADMISSION AS TO WHAT WITNESS WOULD TESTIFY will not be sufficient ground for refusing the motion for a continuance if the application is otherwise sufficient, and it satisfactorily appears that the defendant is entitled to

the postponement: *De Warren v. State*, 29 Tex. 480, citing the principal case. An admission that an absent witness if present would swear to the facts expected to be proved by them is not sufficient to defeat a motion for a continuance on the ground of the absence of witnesses; the admission must be of the facts themselves: *Smith v. Creason's Ex'rs*, 30 Am. Dec. 688.

WHERE IT APPEARS FROM EVIDENCE ADDUCED AT TRIAL THAT NO INJUSTICE HAS BEEN DONE in overruling the motion for a continuance, this offers an additional reason why the verdict should not be disturbed on this ground: *Willison v. State*, 7 Tex. App. 400, citing the principal case. When a continuance has, in the opinion of counsel, been improperly refused, it is the regular course of practice to move for a new trial after the verdict has been rendered, when the judge can see more clearly the bearing of the testimony sought to be introduced, and can have an opportunity of correcting his error if convinced that he has committed one: *McDaniel v. State*, 47 Am. Dec. 744.

PRESUMPTION IS IN FAVOR OF RULING OF COURT IN OVERRULING MOTION FOR CONTINUANCE, unless the contrary is shown by bill of exception: *Meredith v. State*, 40 Tex. 483, citing the principal case. The court will not revise the action of the court below in overruling an application for a continuance, unless the same is presented by bill of exceptions: *Hollis v. State*, 9 Tex. App. 646, citing the principal case. Error in judgment of court below will not be presumed by appellate court, but it must be clearly disclosed: *Thompson v. Monrow*, 56 Am. Dec. 318, note 319.

SCRUPLES OF JUROR AGAINST FINDING VERDICT OF GUILTY WHERE OFFENSE IS PUNISHABLE WITH DEATH form good ground of challenge: Note to *Smith v. Eames*, 36 Am. Dec. 532.

COMMON LAW IN CRIMINAL MATTERS, IN LOUISIANA, is adopted by statute: *State v. McCoy*, 41 Am. Dec. 301.

KIRK v. MURPHY.

[16 TEXAS, 654.]

GENERALLY, IN CASE OF INABILITY OF SHERIFF TO EXECUTE PROCESS, the coroner, by virtue of his office, is authorized to act as his substitute; and where he has acted, the legal presumption is that the facts existed which rendered it proper for him to act in the particular instance.

OBJECTION THAT CHRISTIAN NAME OF ONE OF PLAINTIFFS IS INCORRECTLY STATED in copy of citation served on the defendant is properly overruled when it is correctly stated in the copy of the petition.

PLAINTIFF IN ERROR MUST BRING UP RECORD SO PRESENTING FACTS as that it may be seen on what state of case the court below acted, and if there be error, that it may be certainly seen in what it consists.

FAILURE TO MAKE PART OF RECORD PAPER IN WHICH VARIANCE IS ALLEGED TO EXIST, where there is a contradiction in the record as to what paper it occurs in, renders it uncertain in what the error, if any, consists, and therefore there will appear no ground for reversal.

No transcript being on file, no statement of the case can be given.

D. O. Norton, for the appellants.

S. H. Dearborn and *S. M. Hyde*, for the appellees.

By Court, *WHEELER, J.* The process was directed to the sheriff "or any lawful officer" of the county to execute and return. The sheriff being a party defendant to the suit, and consequently incapacitated to execute the process, it was competent for the coroner to execute it. Generally, in case of the inability of the sheriff to execute process, the coroner, by virtue of his office, is authorized to act as his substitute; and where he has acted, the legal presumption is that the facts existed which rendered it proper for him to act in the particular instance: *Powell v. Wilson*, 16 Tex. 59, lately decided at Galveston.

The plea in abatement to the service is not sworn to, nor does its truth appear by the record. The copy of the petition and citation in the possession of the defendant was not a part of the record; nor is it made a part of the record brought to this court by the bill of exceptions or otherwise. The plea and the bill of exceptions are contradictory; the former states that the variance is in the copy of the citation; whereas the latter represents the objection as having been taken to the copy of the petition. The plea itself ought, perhaps, to be taken as the best evidence of what it contained, and what the objection really was. And if the names of the plaintiffs were truly stated in the copy of the petition, that would sufficiently apprise the defendants who the plaintiffs really were, though there was a mistake in the christian name of one of them in the copy of the citation; and the objection was therefore rightly overruled. But we are of opinion that the objection to the service is not presented by the record in a manner to require revision. It devolves on the plaintiff in error to bring up the record, so presenting the facts as that it may be seen on what state of case the court below acted; and if there be error, that it may be certainly seen in what it consists. He should have made the copy in which the variance is alleged to consist a part of the record. The apparent contradiction in the record, and consequent uncertainty whether it was in the copy of the petition or citation, would then have been removed, and the case would have been properly presented for revision. But as it is uncertain, from the record, in what the error, if any, consists, it can afford no ground for reversing the judgment. Repeated decisions have settled that to authorize a reversal it must certainly appear that there is error in the judgment and in what it consists. The judgment is affirmed.

Judgment affirmed.

RECORD SHOULD CONTAIN EACH PAPER FILED, IN ITS PROPER PLACE AND DATE: *Baltzell v. Nosler*, 63 Am. Dec. 466. Where a part only of the record of the case is produced in the appellate court, a party cannot object that certain things do not appear by it to have been done: *Lynch v. Baxter*, 51 Id. 735. All assignments of error should point to the particular part of the proceedings where the error is alleged to have occurred: *Eslava v. Lepretre*, 56 Id. 206.

AMENDMENTS OF WRIT BY CHANGING NAME OF PERSON NAMED THEREIN: *Crafts v. Sikes*, 64 Am. Dec. 62, and note 63.

VARIANCE IN NAMES; DOCTRINE OF IDEM SONANS: *Schooler v. Ashurst*, 13 Am. Dec. 232, note 233.

WHERE SHERIFF IS PARTY, PROCESS SHOULD ISSUE TO CORONER: *Collais v. McLeod*, 49 Am. Dec. 376; *Bowen v. Jones*, 55 Id. 426, note 427. Service of process by a constable is to be deemed *prima facie* evidence that the state of facts existed which rendered it proper for him to serve the process: *Gay v. State*, 20 Tex. 507, citing the principal case.

TAYLOR v. BOULWARE.

[17 TEXAS, 74.]

HOMESTEAD IS NOT LOST BY DEATH OF WIFE OF OWNER, so long as he continues to make it his residence with his servants and family if he have any, or without them if he have none.

HOMESTEAD IS NOT ABANDONED BY OWNER'S ABSENCE for six or seven months without any intent to change his residence, leaving his family and servants upon the premises.

EXTENDING CORPORATE LIMITS OF TOWN OVER HOMESTEAD by act of the legislature, without any act of the corporation extending the plan of the town thereto, by providing for laying out streets, or the like, will not affect its character as a homestead, under the Texas constitution.

LAND WITHIN TOWN IS NOT TOWN LOT UNTIL STREETS ARE EXTENDED so as to include it in the plan of the town.

APPEAL from a judgment for the plaintiff in an action of trespass to try title. The plaintiff claimed the land as a homestead. After beginning to occupy it as such his wife died. He had no children, but continued, after his wife's death, to reside upon the land with his servants, one of his nieces and her husband residing with him. During the years 1851 and 1852 the plaintiff was absent on a visit to Mexico and South Carolina for six or eight months, but without any intention of changing his residence, and his niece and her husband remained in charge of the homestead with his servants. In 1850, by an act of the legislature, the corporate limits of the town of Marshall were extended over the premises, but there was no evidence that the corporation had done anything by surveys, extension of streets, or the like, to include the premises within the town limits. The

defendant claimed as purchaser under an execution issued against the plaintiff in 1852. The charge of the court was to the effect that the term "family" included a collection of persons living in the same mansion under a common head, upon whom they were in some way dependent, and that the fact that such dependents were slaves made no difference; and also that a legal country homestead once acquired would not be curtailed by the subsequent extension of the corporate limits of a town over it. Certain instructions asked by the defendant, which it is not necessary to state, seem to have been refused. The plaintiff had verdict and judgment, and the defendant appealed.

C. M. Adams, for the appellant.

Marshall and Wigfall, for the appellee.

By Court, *LIPSCOMB, J.* From the statement of facts, there is no question that the whole of the land sued for in this case was, in 1848, the homestead of Boulware, the appellee in this court, and plaintiff in the court below; and it is equally clear that he never relinquished or abandoned it, but that it was his homestead at the time of the sale by the sheriff, under which appellee became the purchaser and obtained possession. The death of the wife whilst it was his homestead and his having no children did not destroy its distinctive character of a homestead, he continuing to reside there with his slaves, hirelings, and niece, and her husband, Mr. McAlister. If he had been without servants or any one with him after the death of his wife, it would still have been his homestead so long as it continued to be his residence, and protected from a forced sale: *Wood v. Wheeler*, 7 Tex. 13. His temporary absence for six or eight months, leaving his slaves and McAlister as agent, and no new residence acquired, could not amount to a forfeiture of his homestead rights.

At the time the homestead was acquired, the protection from a forced sale would have included all the land sued for in this suit, because it did not exceed two hundred acres, and was in the country, not included in city or town; and if the case stopped here, it would be clearly with the appellee. But by the second section of the act incorporating the town of Marshall, passed in February, 1850, the limits of the town were extended so as to include within its limits about three and one half acres of the land; and on this land so included was the dwelling of the appellee, leaving out some out-buildings. This extension of the town was before the sheriff's sale, at which the appellant became

the purchaser. It does not appear that there had been anything done by the corporate authorities in laying out streets or squares on the land of the appellee. The charter directed that the town should be one mile square, taking the court-house as the center of the square. These limits had never been surveyed or marked out, and it had to be matter of proof on the trial that the homestead was within the limits. The county surveyor proved that after the commencement of the term he had, for his own satisfaction, run a line one half mile from the court-house, and found that the three and a half acres before mentioned were included within the town limits. Under such circumstances, can the land so included, on which the residence of the appellee is situated, be regarded as a lot or lots in a town, and restrict his homestead privilege to that quantity of land?

The constitutional protection of the homestead from forced sale is found in the twenty-second section of the general provisions, Hart. Dig. 73, and is as follows: "The homestead of a family, not to exceed two hundred acres of land, not included in a town or city, or any town or city lot or lots in value not to exceed two thousand dollars, shall not be subject to forced sale for any debts hereafter contracted," etc. We are not disposed to question the power of the legislature to extend the limits of the corporation of Marshall; nor to question that, after the plan or plat of the town had been extended, corresponding with the boundaries so authorized to be extended, a homestead falling within such extension, though acquired before it was done, would work a change in the character of the homestead from a country to a town homestead. But we do question the position that the mere act of extending the corporate limits by the legislature, without any act of the corporation to give an extension of the plan of the town to those limits, can change the character of the homestead. The protection of the homestead from forced sale was manifestly a favorite object with the convention, and the constitutional provision intended to secure that object has been regarded as entitled to liberal construction. The term "lot or lots" used in the constitution must be taken and construed in the popular sense of those terms; and when so used, never would be considered as embracing land within the jurisdictional limits of the corporation not connected with the plan of the city. It might be important to the administration of the police laws of the corporation that such lands and those who owned or occupied them should be within its jurisdiction; but until streets had been extended through the land, connecting it with

the plan of the town, the land could not be called a lot of the town. It is admitted that the term "lot" is sufficiently comprehensive to embrace any piece or parcel of land, and the land in controversy might be so designated, but not because it was within the corporate limits of a town. There is a large plantation commencing within three hundred yards of the court-house in which we are now holding court. That plantation may or may not be within the jurisdictional limits of the town of Tyler; but if it is, no one would ever think of designating it as a town lot in the town of Tyler.

There is another view which fortifies the conclusions to which we have arrived; that is, that it is impossible to know how the homestead will be affected by extending streets through it, and connecting it with the plan of the town. It may be so materially affected as to render it of little or no value as a homestead; and if it should be held that it was cut off and separated from the lands without the jurisdictional limits of the corporation, the owner would have an equity that should be secured to him. This, perhaps, could only be done by allowing him to make his homestead on the land without the corporate jurisdiction of the town. This we regard as a strong reason why his homestead should not be disturbed under the circumstances presented in this case. It is not regarded as material to notice the points presented by the appellant's counsel as to the rulings of the court, more particularly because we believe that they are all embraced in the views we have expressed. We find nothing in any of them that could change the result. The judgment is therefore affirmed.

Judgment affirmed.

WHEELER, J., did not sit in this case.

ABANDONMENT OF HOMESTEAD: See a full discussion of this subject in note to *Taylor v. Hargous*, 60 Am. Dec. 607; see also *Walters v. People*, 65 Id. 730.

RIGHT OF SURVIVING SPOUSE IN HOMESTEAD on death of husband or wife: See *Walters v. People*, 65 Am. Dec. 730, and *Poole v. Gerrard*, Id. 481. That a homestead once acquired and not abandoned is not lost by the death of the homesteader's wife, is a point to which the principal case is cited in *Kent v. Beaty*, 40 Tex. 441. So, where after the wife's death all the children marry and remove from the homestead, leaving the husband and father alone: *Kessler v. Draub*, 52 Id. 580. But the case is "no authority for holding a homestead to be secured to a single man, never married, who has no relations or connections living with him:" *Howard v. Marshall*, 48 Id. 479, all citing the principal case.

OTHER POINTS TO WHICH PRINCIPAL CASE IS CITED are, that the term "lot or lots" in the Texas constitutional provision relating to homesteads

does not embrace land within the jurisdictional limits of a city but not within its actual limits as laid out, and where there are no streets dividing it: *Rogers v. Ragland*, 42 Tex. 442; but that unless under very extraordinary circumstances a homestead cannot be partly rural and partly urban: *Iken v. Olenick*, Id. 197.

GOSS v. McCLAREN.

[17 TEXAS, 107.]

JUDGE HAS NO DISCRETION TO GRANT NEW TRIAL AFTER TERM at which judgment was rendered, the judgment then being a vested right, which can be divested only by some direct proceeding.

DECISION BECOMES LAW OF CASE where the supreme court refuses to entertain an appeal from an order or judgment granting a new trial after the term at which judgment was rendered, on the ground that such order is interlocutory, and that it can be brought before the appellate court only by an appeal from the final judgment in the case, and the court cannot, upon a subsequent appeal from the final judgment, refuse to consider such order or judgment awarding the new trial.

AWARD OF NEW TRIAL ON PETITION AFTER TERM IS EXERCISE OF EQUITABLE JURISDICTION under the Texas practice, analogous to that exercised by courts of chancery in England and in the American common-law states in granting new trials at law.

NEW TRIAL IS NEVER GRANTED TO PARTY NEGLIGENCELY SUFFERING JUDGMENT to go against him through want of knowledge of material facts which with reasonable diligence he might have known in due season, either by courts of law or courts of equity.

NEW TRIAL WILL NOT BE GRANTED AFTER TERM EXCEPT ON GROUNDS SUFFICIENT to have entitled the party to a new trial if applied for at the term, and upon the showing of a sufficient excuse for not applying at that time.

NEW TRIAL WILL NOT BE GRANTED AFTER TERM ON GROUND OF IGNORANCE of the recovery of judgment by the party during the term where he was duly served with process, but made no defense because he had spoken to his warrantor to defend the suit and the latter inadvertently omitted to do so.

APPEAL from a judgment for the defendant for the recovery of certain land. The plaintiffs originally recovered judgment by default, but the judgment was set aside on a petition filed by the defendant after the judgment term and a new trial was awarded. The plaintiffs appealed from the judgment awarding a new trial, but were defeated on the ground that the judgment was interlocutory, and that they must wait until final judgment in the cause before taking their appeal. Final judgment having been rendered for the defendant, the plaintiffs brought the present appeal. The only question was as to the correctness of

the judgment awarding the new trial. The facts as to that question are sufficiently stated in the opinion.

J. A. Jones, for the appellants.

G. Lane, for the appellee.

By Court, WHEELER, J. When this case was brought before us at a former term, on appeal from the decision setting aside the judgment of the court of a former term, and awarding a new trial, this court dismissed the appeal, on the ground that the judgment appealed from was not a final disposition of the case. At the same time the court held that after a final judgment disposing of the case the judgment then appealed from might be revised. "That every interlocutory judgment could then be brought under our revision," it was said, "cannot be doubted." And again: "After a final judgment has been rendered in this case, if the parties should be dissatisfied or aggrieved by such judgment, it [the judgment then appealed from] can then be revised, and not before:" *Gross v. McClaran*, 8 Tex. 341, 342, 344. But it is now sought to be made a question whether the court will revise the judgment of the district court setting aside the former judgment and granting a new trial; and to bring the case within the rules which govern the granting of new trials during the term at which the judgment was rendered. But the present is, evidently, very different from the ordinary case of the granting of a new trial. That is an order made during the progress of the cause, before final judgment, while the court has the case under its control, and before any right has vested. This is an original proceeding to vacate a judgment of the court rendered at a former term, when the court has ceased to have any control of the case, and the judgment has become a vested right. In ordinary cases, the judge has a discretion to grant a new trial whenever, in his opinion, wrong or injustice have been done by the verdict; and it is upon this ground that courts have refused to interfere to revise the granting of new trials: *Sweeney v. Jarvis*, 6 Id. 36. No such discretion or power can be claimed for the court after the term at which the final judgment was rendered. When it has been entered of record, and the term has passed by, the decision is binding and conclusive on that and all other courts of concurrent power. This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, founded on the soundest policy: *Parsons v. Bedford*, 3 Pet. 443; *Simpson v. Hart*, 1 Johns. Ch. 95. The maxim

of the civil law, *Res judicata pro veritate accipitur*, is recognized and applied by our own.

The judgment becomes a vested right, which can only be divested by a direct proceeding and for sufficient legal cause, in some of the modes known to the law. Whatever opinion the judge may then entertain of the legality or justice of the verdict and judgment, he is powerless to change it, unless it be by a new proceeding or suit for that purpose. He can no more relieve against it than he can divest any other right of a party without a suit instituted for that purpose, and conducted to judgment by due course of law. And from the very nature of the case, where there has been such proceeding, the party aggrieved must have the same right to have a revision of the judgment upon the legal sufficiency of the cause of action or complaint in that as in any other case. It could never be tolerated that any court should have an irresponsible and irrevocable power to set aside and annul its judgments after the term for any cause which the judge in his discretion might deem sufficient. Yet such would be the consequence of refusing to revise the decision in cases like the present. It is a very different case from that of granting a new trial during the term while the record is *in fieri*, subject to judicial control. Whatever doubt there may be whether we ought not to have revised the judgment on the former appeal, and whatever might be our decision if that question were now before us, there can be no doubt that the decision then made ought to be deemed the law of this case in which it was made, and that, having refused to entertain the appeal and revise the judgment then, we cannot decline it now. Such is the inevitable conclusion from the opinions heretofore held in repeated decisions: *Stewart v. Jones*, 9 Tex. 469; *McKean v. Ziller*, Id. 58; *Bradshaw v. Davis*, 12 Id. 344, 345; *Miller v. Hall*, Id. 556.

The question, then, is, whether the court erred in sustaining the petition, and proceeding thereupon to set aside the judgment of the former term, and grant a new trial. There can be no difficulty in the determination of this question. The grounds set forth in the petition for invoking this extraordinary interposition of the court in granting relief against the judgment of a former term are, that the petitioner and those under whom he claims have had possession of the land in controversy under color of title long enough to bar the plaintiff's right of action on their elder location and survey; and his excuse for not making this his defense to the plaintiff's action is, that he had notified one Hill,

from whom he derived his title, of the pendency of the suit; that Hill had promised to attend to the suit and defend his title, and that, relying on the promises of Hill, he gave no further attention to it; that Hill failed to appear and defend the suit, and the consequence was that the plaintiffs recovered a final judgment against him, of which he was not apprised in time to move for a new trial at that term of the court; that he is informed by Hill that he, Hill, intended to defend the suit, but that he understood that the petitioner and one Clark were jointly sued, and for several portions of the land embraced in the survey; that he procured the services of an attorney and had the suit against Clark continued at that term, and thought the case of the petitioner would be continued also, and "he gave himself no further trouble in regard to the matter," and that Hill told him that he had no knowledge of the judgment against him until after that term of the court; that he believes the statements of Hill to be true; finally, that the amount he will be able to recover of Hill upon his warranty of title will not be adequate to compensate him for the loss of the land. The petition was not filed until in the December following the June term of the court at which the judgment was rendered. It is sworn to by the petitioner, but is unsupported by the affidavit of Hill or by any other evidence whatever. As an excuse for the delay in filing the petition, it is averred that the petitioner at first intended to prosecute a writ of error to reverse the judgment, and took proceedings for that purpose; but was afterwards advised that he could not obtain a reversal, and abandoned his writ of error. Whereupon the petitioner prayed for and obtained an injunction; and the court overruled exceptions to the legal sufficiency of the petition, and proceeded further under the prayer for general relief to set aside the former judgment and direct a new trial. To state such a case would seem sufficiently to indicate the disposition which must be made of it.

The case, shortly stated, is, that the petitioner might have successfully pleaded the statute of limitations to the plaintiff's action, if he had seen proper to do so; but he did not, because a third person had promised to attend to it for him, and that person did not, because he did not take the trouble to inform himself what suit it was he was desired to defend. This is substantially the case, and the whole case, made by the petition. And upon this state of case the judgment rendered at a former term of the court was set aside, and a retrial of the case directed. It would seem scarcely necessary to enter upon argument or the

examination of authorities to show that such a proceeding was wholly unauthorized and unprecedented. Whether we refer to the practice of courts of chancery in directing new trials in cases at law, or the practice of this court in similar cases, the action of the court upon the case stated will appear equally unsupported by any principle of adjudication or rule of practice known to this or any other court. Where the granting of new trials after the term has been sanctioned by this court, it has been the exercise of an equitable jurisdiction, analogous to that exercised by courts of chancery in England and the common-law states of the Union, in granting new trials in suits at law: *Gross v. McClaran*, 8 Tex. 343; *McKean v. Ziller*, 9 Id. 59. That was by a bill of review, or of the nature of a bill of review, usually called bills for a new trial: 2 Story's Eq. Jur., sec. 887. "As the courts of equity," says Lord Redesdale, "will prevent the unfair use of an advantage in proceeding in a court of ordinary jurisdiction gained by fraud or accident, they will also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights. Upon this ground, there are many instances of bills to prevent the effect of a judgment at law, and to obtain relief in equity where it was impossible by any means to have the matter properly investigated in a court of law; or where the matter might be so investigated to bring it again into a course of trial. Bills of the latter description, or, as they are usually called, bills for a new trial, have not been of late years much countenanced. In general, it has been considered that the ground for a bill to obtain a new trial after judgment in an action at law must be such as would be ground for a bill of review of a decree in a court of equity upon discovery of new matter:" Mitf. Eq. Pl. 131; 2 Story's Eq. Jur., sec. 888. "Anciently," it was said by Chancellor Kent in *Floyd v. Jayne*, 6 Johns. Ch. 479, 481, "courts of equity exercised a familiar jurisdiction over trials at law, and compelled the successful party to submit to a new trial, or to be perpetually enjoined from proceeding on his verdict. This relief was not granted unless the application was founded upon some clear case of fraud or injustice, or upon newly discovered evidence, which could not possibly have been used upon the first trial. But this practice has long since gone out of use, and such a jurisdiction is rarely exercised in modern times, because courts of law are now in the competent and liberal exercise of the power of granting new trials." But when the jurisdiction was exercised most liberally in courts of chancery, the court would

never interpose to grant relief in this way, except where the party was prevented without his fault from making his defense; or upon newly discovered evidence, which could not possibly have been used upon the trial: *Id.*; 3 Daniell's Ch. Pr. 1727; Story's Eq. Pl., secs. 412 et seq; *Saunders v. Jennings*, 2 J. J. Marsh. 513.

Neither courts of chancery nor of law ever interposed to afford relief, by granting a new trial, where a party had permitted a judgment to be recovered against him by his own supineness and negligence. His want of knowledge of evidence material to his defense, or of the recovery of a judgment against him where he was served with process, or of any other matter which it was material for him to know in order to make his defense, or apply in time for a new trial, has never been held to afford a party any excuse, if by the use of reasonable diligence he might have known it. The question in such a case, said Lord Eldon, always is, not what the party knew, but what, using reasonable diligence, he might have known: Daniell's Ch. Pr. 1734; *Cook v. De la Garza*, 13 Tex. 445. It cannot be doubted that by the use of reasonable diligence the petitioner might have known whether the suit pending against him for the recovery of the premises on which he resided was defended or not; or whether judgment was likely to be recovered or had been recovered against him, whereby he was liable to be ejected from his possessions. It would seem that a man of any prudence or discretion would have acquainted himself with such a state of case; if, indeed, he had any confidence in his title or his ability to make any successful defense to the action. But it is unnecessary to discuss the merits of the petitioner's case. It is quite too clear for controversy or question that his petition did not present a case which would have entitled him to equitable relief upon any principle which has ever been recognized in courts of chancery. It is equally clear that he was not entitled to have the judgment of a former term set aside and a new trial granted, upon any principle or rule of practice recognized by this court. Thus in *Cook v. De la Garza*, *supra*, we held it to be perfectly clear and well settled that to entitle a party to a new trial, applied for upon equitable grounds after the term, he must show sufficient matter to have entitled him to a new trial, if applied for at the term, and a sufficient legal excuse for not having then made his application: *Cook v. De la Garza*, 13 Tex. 431, 444. The same principle was recognized in *Spencer v. Kinard*, 12 Id. 180, and *Miller v. Hall*, Id. 556. In *Mus-*

sina v. Moore, 13 Id. 7, and *Kitchen v. Crawford*, Id. 516, the right of a party to a new trial was maintained, on the ground that where the defendant had been deprived of the opportunity of making his defense, without any fault on his part, he not having had personal service or actual notice of the suit, the statute, Dig., art. 783, gave him the right to a hearing, and a retrial of the case. But in the present case the defendant had notice by personal service, and an opportunity afforded to defend the suit; but he did not because he expected his warrantor to defend, and the latter did not because he expected his attorney to attend to the matter. If the judgments of courts were liable to be set aside and new trials granted on such grounds as these, there would, indeed, never be an end of litigation. It has been well said, that "if mistakes in practice or inadvertence furnished reason for a new trial, it would encourage litigation and reward ignorance and carelessness at the expense of the other party:" 6 Co. 9. And therefore the law in such cases wisely acts upon the maxim, *Interest reipublicæ ut sit finis litium*—it is for the public good that there be an end of litigation.

"After a recovery by process of law," says Lord Kenyon in *Marriott v. Hampton*, 7 T. R. 269, "there must be an end of litigation; if it were otherwise, there would be no security for any person;" and great oppression might be done under color and pretense of law: 6 Co. 9. If a new trial had been asked upon these grounds at the term, no one would be heard to contend that they were legally sufficient to warrant the court in granting it. Can it be supposed that by permitting the term of the court to pass by without making the application the party was entitled to have it more favorably entertained and considered; or that a new trial should then be granted upon an original proceeding for causes for which it could not legally have been granted if timely application had been made? If there be anything which is perfectly clear beyond all question, on principle and authority, it is the opposite of such a supposition. There can be no presumption in this case, as there might be where a new trial was granted during the term, *Sweeney v. Jarvis*, 6 Tex. 43, of the existence of any fact not appearing by the petition to support the action of the court; for the facts upon which the court acted could only appear by the petition; the court could only act upon the case therein stated. That, manifestly, was not sufficient to entitle the petitioner to the relief sought; or to any relief upon any principle on which courts of chancery proceed

in granting relief against judgments at law, or by which courts of law themselves are governed in the granting of new trials. The court, therefore, erred in overruling the exceptions to the petition, and because the court had no authority, upon the case stated, to set aside the former judgment and direct a new trial, the judgment in that regard must be reversed and annulled, and the petition and proceeding thereon dismissed.

Reversed and dismissed.

EQUITY JURISDICTION TO GRANT NEW TRIAL AFTER JUDGMENT AT LAW: See *Skinner v. Deming*, 54 Am. Dec. 463; *Burnham v. Hays*, 58 Id. 393, note; *Taylor v. Sutton*, 60 Id. 682, and note thereto. In *Taylor v. Fore*, 42 Tex. 258, the principal case is cited to the point that courts of equity exercised a familiar jurisdiction in compelling a new trial at law, but that the jurisdiction is now rarely exercised. And in *Gill v. Rogers*, 37 Id. 631, the case is cited to the point that where from any cause not under a party's control he fails to move for a new trial within the prescribed time, he has a clearly defined remedy by bill in equity.

The Texas practice as to awarding new trials upon petition after the judgment term is merely the exercise of this equitable jurisdiction, and proceeds upon equitable grounds. After the judgment term the court has no discretionary power over a judgment, but as stated in the principal case, the rights of the parties under such judgments are vested, and can only be divested by a direct proceeding for sufficient legal cause: *Caperton v. Wanslow*, 18 Tex. 134. But it is conclusively settled by repeated decisions of the Texas supreme court that a new trial may be granted by a district court, in a case properly invoking its equitable powers, after the adjournment of the judgment term: *Plummer v. Power*, 29 Id. 14. But the party then applying for relief against the judgment must show proper equitable grounds therefor: *Vurdeman v. Edwards*, 21 Id. 737. He must show not only sufficient cause to have entitled him to a new trial if applied for at the term, but sufficient excuse for not making the application then: *Caperton v. Wanslow*, 18 Id. 132; *Ragsdale v. Green*, 36 Id. 195; *Hough v. Hammond*, Id. 659; *Bryorly v. Clark*, 48 Id. 352. A petition showing that by some "mistake, accident, or omission, then beyond the control" of the petitioner, or which he "considered out of his power to prevent," certain papers essential to his case were not submitted to the jury, and giving no excuse for not moving for a new trial at the term does not disclose sufficient grounds for relief: *Fisk v. Miller*, 20 Id. 578. So a petition stating, on information and belief of the petitioner, that there was a certain agreement for a continuance, whereby he was prevented from making his defense, and showing that such agreement was within the knowledge of his attorney, whose affidavit is not presented, is not sufficient: *Caperton v. Wanslow*, 18 Id. 133. The principal case is recognized as authority in all these decisions.

In *Overton v. Blum*, 50 Tex. 423, it is said that, "although the contrary might be inferred from some of the earlier decisions [citing the principal case and some others], it must now be regarded as settled that a new trial is never in fact granted after the adjournment of the term of court at which the judgment is rendered, no matter what are the grounds urged in support of the application." But it is conceded that the court may, in the exercise of its equitable powers, re-examine the case after the judgment term, upon a proper

showing, and award relief. It would seem, however, to make little practical difference whether such a proceeding is called a new trial or not, since the result of it is the same as if it were a new trial.

The principal case is cited in *Taylor v. Fore*, 42 Tex. 257, as throwing grave doubt upon the question whether or not a judgment awarding a new trial, after term, is an interlocutory judgment. See, on that point, the note to *Williams v. Field*, 60 Am. Dec. 431. The case is cited also in *Mayer v. Woodall*, 35 Tex. 689, upon the general question of the finality of a judgment, to the point that "there must be an end somewhere to litigation; some time or other the rule *res judicata* must apply."

DILIGENCE REQUIRED ON APPLICATION FOR NEW TRIAL ON GROUND OF SURPRISE, ETC.: See *May v. Hanson*, 63 Am. Dec. 135, and cases cited in the note thereto.

DISCRETION OF COURT IN GRANTING NEW TRIAL DURING TERM is said, in *Puckett v. Reed*, 37 Tex. 310, not to be reviewable on appeal, citing the principal case.

LAW OF CASE: See *Fortenberry v. Frazier*, 39 Am. Dec. 373.

PHILLEO v. SANFORD.

[17 TEXAS, 227.]

WAGONER IS COMMON CARRIER where he carries goods for hire for all persons indifferently.

COMMON CARRIER CARRYING GOODS IN COVERED WAGON IS LIABLE FOR INJURY BY RAIN, although guilty of no negligence, being regarded as an insurer against loss from any such cause.

APPEAL from a judgment for the defendants, in an action against them as common carriers, for injury to certain goods of the plaintiff which they undertook to transport by wagon. The defendant Sanford pleaded infancy, and proved that he was a minor. It appeared that one of the defendants assured the plaintiff that they had a good and safe wagon, and that the wagon was pointed out to them at the time. It also appeared that they informed him that the wagon was covered with a good Lowell sheet. The goods were damaged by rain in the course of the journey. The defendants encountered rain several times, and during one night there was a heavy storm of wind and rain. There was evidence tending to show that on one occasion at least the defendants spread bed-quilts over the goods at night to protect them from the rain. The charge to the jury was to the effect that if the wagon was covered and secured in the manner customary with wagoners in that part of the state, and if the plaintiff, knowing the condition of the wagon, consented to transportation therein, and if the wagoner used all care and diligence in his power to prevent injury, notwithstanding which

the injury happened, the defendants were not liable. Sundry instructions asked for by the plaintiff were refused, or given with qualifications. Verdict and judgments for the defendants, and new trial refused.

Anderson and Hood, for the appellant.

Donley, Bowden, and Chilton, for the appellees.

By Court, WHEELER, J. The defendants were common carriers, according to the rule laid down by this court in the case of *Chevallier v. Straham*, 2 Tex. 115 [47 Am. Dec. 639]. The doctrine of the law respecting the liability of common carriers was well considered in that case, and is too well settled to require further examination here. There manifestly is nothing in this case to take it out of the general rule in respect to the liability of common carriers, as laid down by this court in the case of *Chevallier v. Straham*, *supra*. In the charge to the jury, and the refusal of a new trial, the court was doubtless influenced by *Chevallier v. Patton*, 10 Tex. 344. But that was a particular and excepted case, having especial and exclusive reference to that particular mode of transportation. Upon the facts of that case, it was settled, and rightly, on principle, that the carrier was not responsible for a loss which occurred from causes necessarily incident to that mode of transportation, which was as well known to the person who shipped the goods as to the carrier. It was not intended, as the opinion shows, to unsettle any principle of the law respecting the liability of common carriers; and it is expressly stated that the exception was not to be extended so as to conflict, in any degree, with the opinion of the court in *Chevallier v. Straham*, *supra*. It is unnecessary to repeat here the doctrines of that opinion. They are as clearly and firmly settled by the uninterrupted current of decisions in the English and American courts as any principles of the law can be; they are not to be overturned or shaken by anything short of legislative enactment, and they apply in their full force to the facts of the present case. It is a very different case from that of shipping cotton upon an open boat, knowing that it was not and would not be covered so as to protect it from the weather. It cannot be pretended that goods may not be conveyed securely in a covered wagon without being exposed to injury from rain, and he who undertakes their transportation in this mode, as a common carrier, insures their carriage securely and without injury from any such cause. The owner confides them to his care and discretion, and he is responsible if they sustain injury, unless it be in the

excepted cases: 2 Kent's Com. 597; *Chevallier v. Straham*, *supra*, and cases cited. The charge of the court was inapplicable to the case and calculated to mislead, and the verdict, as to the defendant Carr, was contrary to law and the evidence. The plea of infancy of the defendant Sanford was sustained by the proof, and as to him the judgment is affirmed; but as to the defendant Carr it is erroneous, and must be reversed and the cause remanded for a new trial.

Ordered accordingly.

WAGONER IS COMMON CARRIER, WHEN: See *Gordon v. Hutchinson*, 37 Am. Dec. 464; *Chevallier v. Straham*, 47 Id. 639, and note.

MOKE v. FELLMAN.

[17 TEXAS, 367.]

REFUSAL OF LEAVE TO PLEAD INFANCY AFTER ANSWER TO MERITS, and when the parties are about to go to trial, is not error.

LETTERS OF DRAWER AFTER ACCEPTANCE OF DRAFT, DIRECTING DRAWEE TO WITHHOLD payment of part, because the draft was drawn for too much, are inadmissible evidence in an action by the holder against the drawee.

VERDICT FOR "AMOUNT DUE ON THE DRAFT, WITH USUAL INTEREST," is sufficiently certain to support a judgment for the amount of the draft and interest, less a credit appearing on the draft.

APPEAL from a judgment against the acceptor of a certain draft. The opinion states the facts.

Campbell and Smith, for the appellant.

Turner and Sneed, for the appellee.

By Court, LIPSCOMB, J. This suit was brought by the appellee, on a draft drawn in his favor on the appellant and accepted by the latter. The defendant below answered by a general denial of the charges in the petition. Second, tender of all excepting twenty-five dollars, which he avers that he had been instructed by the drawer to retain in his hands. After these pleas, and when about to go into trial, the defendant asked leave to file a plea in abatement, on the ground of the infancy of the plaintiff, which was refused. On the trial, the defendant offered to prove that he had received letters from the drawer of the draft, requesting him to withhold the payment of twenty-five dollars, alleging that the drawer had drawn for that amount too much. The existence of the letters and their loss was proved. This evi-

dence was rejected by the court. The rejection of this evidence and the refusal to receive the plea of the infancy of the plaintiff are assigned as error.

The plea of the infancy should have been offered before answer, and there is nothing in its character that could claim any favor from the court when presented out of the regular order of defense; and the court did not err in refusing to receive it.

There is no error in rejecting the evidence of the letters of of the drawer of the draft. The drawer could not make evidence in his own favor against the holder of his draft. The letters would not have been evidence if they had been introduced. It was therefore right and proper to reject proof of their contents.

The only remaining ground of error worthy of notice is that the verdict of the jury does not support the judgment of the court. There is nothing in this assignment when the record is properly understood. It appears that the jury made two returns; the first found "for the plaintiff one hundred and forty-six dollars, with interest and costs up to the time when the legal tender was made." This was very properly regarded by the court as no verdict, because it did not fix the time of the tender, and the court directed them to return again and consider of their verdict. Afterwards they returned into court the following verdict: We, the jury, find for the plaintiff the amount due on the draft, with usual interest. This verdict was received by the court, and it was on this that the court rendered judgment. By an irregularity in making up the record, the order of time when the two returns were made has been transposed, making the first last, and the judgment following would, without further examination of the record, seem to have been rendered upon the return immediately preceding it. The bill of exceptions, made a part of the record, sufficiently explains the clerk's mistake, and shows to which return the judgment applies. The verdict is not as explicit as it might have been; it finds, however, in effect, what the draft shows to be due, and such findings have been regarded as sufficiently certain. There was a credit upon the draft, which seems to have been allowed in the judgment. The statement of facts shows a complete failure to sustain the plea of tender, and there was no ground for a new trial. The judgment is affirmed.

Judgment affirmed.

WINTZ v. MORRISON.

[17 TEXAS, 372.]

SALE IS VITIATED BY ANY MISREPRESENTATION OR CONCEALMENT OF MATERIAL FACTS respecting the property for the purpose of deceiving, and which does deceive, the buyer.

CONCEALMENT BY VENDOR OF HORSES OF FACT THAT THEY HAVE CONTAGIOUS DISEASE of a fatal character, to his knowledge, such disease not being discoverable by such an examination as a careful man would make before buying, entitles the purchaser to rescind the contract, and to recover damages for the fraud, especially where such concealment is accompanied by actual misrepresentations accounting for any suspicious appearances in the animals.

RULE OF CAVEAT EMPTOR DOES NOT COVER FRAUDULENT CONCEALMENT OR MISREPRESENTATION by the vendor of any material fact inducing the purchaser to buy.

INSTRUCTION AS TO MEASURE OF DAMAGES IN ACTION AGAINST VENDOR OF DISEASED HORSES FOR FRAUDULENT CONCEALMENT of the facts respecting such disease, and for the rescission of the contract on account of such fraud, to the effect that the plaintiff is entitled to the cost price of the animals that have died, with interest, and to the difference in value between those yet living which are diseased and sound animals of the same quality, with interest, and also to compensation for necessary care and attention bestowed upon the animals, is sufficiently favorable to defendant.

VENDOR OF DISEASED ANIMALS IS LIABLE FOR DAMAGES FOR COMMUNICATION OF SUCH DISEASE to other animals purchased at the same time, and also, it seems, for the communication of such disease to other animals of the purchaser, in an action by such purchaser for fraud in concealing the fact that they are so diseased.

ERROR IN INSTRUCTION FAVORABLE TO APPELLANT is no ground for the reversal of a judgment.

INSTRUCTION ASSUMING FACT TO BE DOUBTFUL WHEN THERE IS NO CONFLICT of evidence respecting it, or assuming hypothesis at variance with the fact, should not be given.

RULE THAT JUDGE SHOULD NOT CHARGE ON WEIGHT OF EVIDENCE applies only where there is doubt, and the jury are required to weigh the evidence.

TENDER OF RETURN OF ANIMALS TO VENDOR, IN ACTION FOR FRAUDULENT CONCEALMENT of the fact that they are diseased, is not necessary to entitle the vendee to recover his damages; nor is it necessary to entitle him to rescind the contract if the animals are entirely worthless.

VENDOR, IN SUIT BY PURCHASER TO RESCIND SALE FOR FRAUD, HAVING TRANSFERRED PURCHASER'S NOTES to third persons, so that he cannot deliver them up to be canceled, is liable for the amount in money.

APPEAL from a judgment for the plaintiff in a suit to rescind a contract for the sale of a drove of horses to him by the defendant, on account of the defendant's fraudulent concealment of the fact that the animals were afflicted with a malignant contagious

disease, whereby half of them had already died and the others were likely to die, and to recover damages for the fraud. It appearing that the defendant had transferred certain notes of the plaintiff given for part of the purchase money, judgment was entered in favor of the plaintiff for the amount of damages found by the verdict. The various assignments of error and the facts necessary to explain them sufficiently appear from the opinion.

Paschals and Stribling, for the appellant.

Waul and Wilson, and J. Ireland, for the appellee.

By Court, WHEELER, J. The assignment of error questions the accuracy of the charge of the court, the propriety of refusing instructions asked by the defendant, and the sufficiency of the evidence to warrant the verdict.

In examining the charge of the court and the instructions refused, regard must be had to their relevancy and pertinency to the issues and proofs. The action was for fraud and deceit practiced in the sale; and was well brought on the special facts and circumstances relied on as creating the defendant's liability. It was (as all our actions in general are) a special action on the plaintiff's case. The petition sets forth the sale of the property for its full, fair value; its apparent soundness, but real unsoundness and the nature of it; and the defendant's knowledge and fraudulent concealment and false representations. The answer put in issue the fact of the defendant's knowledge of the unsoundness, and his concealment and misrepresentations. Upon these issues the case was submitted to the jury; the material averments of the petition were well supported by the proofs; and thereupon the court instructed the jury, in substance, that if the drove of horses had among their number any animal with an infectious or contagious disease, which could be discovered by such an examination as a careful and prudent man would make under like circumstances, the plaintiff could not recover damages occasioned by such disease. But if the lot of horses sold were so diseased at the time of the sale, and the defendant knew and suppressed the fact, and the plaintiff could not ascertain it before making the purchase by such an examination as a careful man would make, the plaintiff was entitled to recover the damages he had sustained by reason of the unsoundness. In this there clearly was no error of which the defendant can complain. It was in proof that he knew the horses were diseased, and represented them as sound. He accounted for any suspicious appearances, by saying they had had the distemper and

were getting well of it; thus diverting the attention of the plaintiff, and lulling any suspicions appearances might have excited; inducing him to believe they were occasioned by a comparatively trivial disease, which all the witnesses agree that it was not, instead of the really malignant and fatal disorder which the proof shows it to have been. There can be no question that the evidence discloses a case of manifest fraud.

Nothing can be better settled than that fraud vitiates every contract, and may consist either in misrepresentation or in concealment. Every misrepresentation with regard to anything which is a material inducement to a sale, which is made to deceive and which actually does deceive the vendee, vitiates the contract of sale. So, also, every concealment of defects by artifice and for the purpose of deceiving the buyer is a fraud which vitiates the sale. "The inference of fraud is easily and almost inevitably drawn where there is a suppression or concealment of material circumstances, and one of the contracting parties is knowingly suffered to deal under a delusion:" 2 Kent's Com. 483; Story on Cont., secs. 840-842. The inference is peculiarly cogent and quite irresistible where, as in this case, the vendor suppresses or conceals the fact that the animal sold is affected with a contagious and fatal disorder, which will not only occasion its loss, but is liable to be communicated to others, and cause still further destruction and loss. The suppression or concealment of such a fact in the sale cannot be considered as anything less than a positive fraud, and of a peculiarly aggravated character. But there was not only fraudulent concealment in this case, but misrepresentation also, fixing the character of the transaction, on the part of the defendant, as fraudulent beyond a question. For there can be no question that such misrepresentations, in respect to that which was the inducement to the purchase, constituted a fraud upon the plaintiff. Where a party misrepresents a material fact, or produces a false impression by words or acts in order to mislead or to obtain an undue advantage, it is a case of manifest fraud: 1 Story's Eq. Jur., secs. 192 et seq.; 2 Kent's Com. 484. And in such a case the ground of the action is the deceit practiced upon the buyer, to his injury. It undoubtedly is true, as stated in the text of Judge Story to which we are referred by the counsel for appellant, that "the first and general rule in relation to warranty in cases of sale is that the purchaser buys at his own risk, *caveat emptor*, unless the seller either give an express warranty, or unless the law imply a warranty from the circumstances of

the case or the nature of the thing sold, or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale:" Story on Sales, sec. 345. But here the rule *caveat emptor* does not apply; for it is the very case which is given as an exception in the text, where the seller has been guilty of a fraudulent representation and concealment in respect to the material inducement to the sale.

It is not deemed necessary to examine the doctrine of warranty in cases of sale, but it may be observed, in the words of the same learned author, that "the tendency of all the modern cases on warranty is to enlarge the responsibility of the seller; to construe every affirmation by him to be a warranty, and frequently to imply a warranty on his part from acts and circumstances, wherever they were relied upon by the buyer. The maxim of *caveat emptor* seems gradually to be restricted in its operation, and limited in its dominion, and beset with the circumvallations of the modern doctrine of implied warranty, until it can no longer claim the empire over the law of sales, and is but a shadow of itself. Of course, if there be any fraud or gross mistake in the case, the contract of sale would be thereby completely annulled:" Id., sec. 359. "Gradually the old common-law rule of *caveat emptor* has been losing ground, and the law has been tending towards the doctrine of the Roman law, which is its antipode—*caveat venditor*—until it now occupies a middle ground between the two, by requiring the strictest good faith on the part of the seller in all that he says and does, and throwing on the buyer the responsibility for any foolish mistakes or wrong conclusions which may result from his trusting to his own judgment:" Id., sec. 365.

In respect to the measure of damages, the court adopted the general rule in actions by the vendee for the breach of warranty; that is, the difference between the price paid and the worth of the article at the time of delivery, with its defects and vices. But if the vendee has sustained other additional injury which is either the immediate consequence of the failure of the vendor to perform his contract, or a material incident thereto, he may recover such damages: Story on Sales, sec. 453. The plaintiff, however, was only allowed the benefit of the latter proposition, as to consequential damages, to cover the expense of taking care of the horses. The recovery was restricted by the charge, and was in fact confined to the actual loss which the plaintiff had sustained in the horses sold him, and compensation for the necessary care and attention bestowed upon them;

and though there was evidence of other damage, it was not allowed.

In the case of *Jeffrey v. Bigelow*, 13 Wend. 518 [28 Am. Dec. 476], which was a case similar to the present, and is in point, the supreme court of New York did not thus restrict the plaintiff in his right to recover consequential damages. The plaintiff had purchased of the defendants a flock of sheep, which were diseased. The disease proved to be contagious, and was communicated to other sheep of the plaintiff which he before owned; and it was held that his claim for damages was not limited to the loss of the sheep purchased, but extended to the other sheep to which the distemper was communicated. The court said: "The plaintiff is entitled to such damages as necessarily and naturally flow from the act of the defendants. The damage is not the mere difference between a diseased sheep and a healthy one, but the damage sustained by communicating the disease to the plaintiff's flock. . . . If a person sells me a cow which he knows to be affected with a contagious distemper, and conceals this disease from me, such concealment is a fraud on his part, which renders him responsible for the damages I suffer, not only in that particular cow which is the object of his original obligation, but also in my other cattle to which the distemper is communicated; for it is a fraud in the seller which occasions this damage: Evans's Pothier, pt. 1, c. 2, art. 3, p. 166." *Id.* 523, 524. On the subject of the fraudulent concealment, the court held that as the agent of the defendants had authority to sell, and did sell, with a knowledge that the sheep were diseased, and did not communicate the fact to the purchaser, his principals, although they had no actual knowledge of the fraud, were nevertheless liable to respond in damages to the purchaser.

It is manifest that whatever error there was in the charge of the court was committed in favor of the defendant. He cannot complain of such error.

It is unnecessary to examine separately the several instructions refused. It will suffice to say that those not embraced substantially in the charge given were either not correct in themselves or were not warranted by the proof. As we have seen, it would not have been correct, in point of law, to have instructed the jury, as asked, that the defendant was not responsible in damages for the loss of any part of the drove not actually diseased at the time of the sale; or for loss occasioned by the communication of the disease to other portions of the drove; the correct rule being that the plaintiff was entitled to such damages as neces-

sarily or naturally resulted from the act of the defendant. Nor would the court have been warranted in giving instructions which assumed that the disease was open and apparent to the observation of the plaintiff. The proof was that a part of the stock was not seen by the plaintiff, but was taken on the defendant's representation; and there was nothing in the evidence to warrant the supposition that by ordinary care the plaintiff might have been apprised of the character of the disease, if even that would exonerate the defendant in a case of fraud: Story on Sales, secs. 354 et. seq. Nor would the court have been warranted in giving the charge which assumed that the disease was not, or may not have been, contagious; since, from the evidence, there could be no doubt that it was so. Where there is no conflict in the testimony, and no room to doubt or hesitate as to a matter of fact in issue, the judge, in his charge, ought not to assume that it is or may be doubtful. Such a course is calculated either to confound the jury, by causing them to doubt the justice of their own clear convictions, or to mislead by inducing them to suppose they may find the fact either way, when the evidence warrants but one conclusion; and to find contrawise would be to find manifestly against the evidence. The rule which forbids the judge to charge upon the weight of evidence does not require or authorize him to assume as doubtful that which is clear and indisputable; or to assume hypotheses at variance with the certain fact. Where the evidence to a fact is positive and not disputed or questioned, it is to be taken as an established fact; and the charge of the court should proceed upon that basis. It is only where there may be doubt that the jury are required to weigh the evidence, and it is then only that the rule applies that the court shall not charge upon the weight of evidence. It is not the meaning of the rule that the judge shall ignore the indisputable facts of the case; or distrust the evidence of his senses; or that he shall assume that the jury may doubt where there is no room for doubt; or find contrary to the evidence and manifest truth and justice of the case.

It is unnecessary to review the evidence on which the verdict was found. The question of fact as to the character of the disease, the knowledge, concealment, and misrepresentations of the defendant, the fraud practiced, the value of the property, and the damages actually sustained, were questions for the jury, on which they have passed; and their verdict is well supported by the evidence.

It is objected that there was no tender of the horses to the defendant at his place of residence. Such tender was not necessary to entitle the plaintiff to recover his damages; nor was it necessary to entitle him to a rescission of the contract that he should have offered to restore the property, it having been proved and found by the jury to be utterly worthless. But if such offer was necessary, it was made; the defendant did not object to the manner of it, but positively refused to take back the property. More could not be required of the plaintiff.

The assignment of errors does not question the correctness of the judgment; and the appellant has nothing to complain of in the manner of its rendition. The petition prayed the delivery up and cancellation of the notes given the defendant for a part of the price of the purchase. But the answer of the defendant disclosed that he had already assigned and transferred the notes to a third person. They were transferred out of the power of the party and the court. The court could not act upon them. The only alternative relief which the court could award was granted, and rightly, under the prayer for general relief. We are of opinion that there is no error in the judgment, and it is affirmed.

Judgment affirmed.

FRAUD OR MISREPRESENTATION BY VENDOR OF CHATTEL, EFFECT OF, and remedies for: See *Connersville v. Wadleigh*, 41 Am. Dec. 214; *Johnson v. McLane*, 43 Id. 102; *Harmon v. Sanderson*, 45 Id. 272; *Price v. Lewis*, 55 Id. 536; *Trice v. Cockran*, 56 Id. 15; *McCulloch v. Scott*, Id. 561; *Cunningham v. Smith*, 60 Id. 333; *Kinsbury v. Taylor*, 50 Id. 607; *Mahurin v. Harding*, 59 Id. 401, and cases cited in notes thereto.

SELLING DISEASED ANIMALS AS SOUND, LIABILITY FOR: See *George v. Johnson*, 44 Am. Dec. 288; *Staines v. Shore*, 55 Id. 492; *Mahurin v. Harding*, 59 Id. 401, and cases cited in notes thereto. As to the measure of damages in such cases, see *Jeffrey v. Bigelow*, 28 Id. 476; *Stiles v. White*, 45 Id. 214; *Woodward v. Thatcher*, 52 Id. 73, and notes thereto.

RETURN OF CHATTEL ON RESCISSION FOR FRAUD IN SALE, NECESSITY OF: See *Johnson v. McLane*, 43 Am. Dec. 102; *McCulloch v. Scott*, 56 Id. 561, and notes.

PARTY CANNOT COMPLAIN OF ERROR IN HIS FAVOR: See *McGowen v. West*, 38 Am. Dec. 463; *People v. Call*, 43 Id. 655; *Seabury v. Stewart*, 58 Id. 254, and notes thereto; *Hale v. Crowell*, 50 Id. 301.

INSTRUCTION UPON WEIGHT OF EVIDENCE: See *Trovillo v. Telford*, 31 Am. Dec. 484; *Phillips v. Kingfield*, 36 Id. 760; *Whiteford v. Burckmyer*, 39 Id. 640; *Potts v. House*, 50 Id. 329; *Crozier v. Kirker*, 51 Id. 724; *Wilson v. Huson*, 53 Id. 133; *Beverly v. Burke*, 54 Id. 351; *Rushin v. Shields*, 56 Id. 436; *Woolfork v. Sullivan*, 58 Id. 305; *Tibeau v. Tibeau*, 59 Id. 529; *Houghtaling v. Ball*, Id. 331; *Jones v. State*, 62 Id. 550; *Porter v. Seiler*, Id. 341; *Melvin v. Easley*, Id. 471.

BURDITT v. SWENSON.

[17 TEXAS, 489.]

PRIVATE NUISANCE IS ANYTHING WHICH DOES HURT OR ANNOYANCE to the lands, tenements, or hereditaments of another. The annoyance need not be such as to endanger health, but it is sufficient if it is offensive to the senses, and renders the enjoyment of life and property uncomfortable, or even causes a well-founded apprehension of danger.

LIVERY-STABLE IN TOWN IS NOT NUISANCE *prima facie*, but becomes so if kept or used so as to destroy the comfort of owners and occupants of adjacent premises, and so as to impair the value of their property.

PERPETUAL INJUNCTION AGAINST KEEPING LIVERY-STABLE upon a lot adjacent to plaintiff's store in a town will be awarded where it appears that it is kept in a filthy and unsafe condition, so as to be offensive and dangerous to the plaintiff, and the owners thereof insist that it is well kept, and do not propose to keep it differently; and the injunction will not be limited to restraining the manner of keeping it.

APPEAL from a decree awarding an injunction against the manner of keeping the defendants' livery-stable. The petition of the plaintiff set out with great particularity that he was the proprietor and keeper of a certain store for the sale of general merchandise upon a certain lot in the city of Austin, and was carrying on a valuable business therein; that the defendants had erected upon an adjoining lot a large livery-stable, notwithstanding the remonstrances of the plaintiff; that the livery-stable was kept in such a filthy condition as to be very offensive to the plaintiff and his customers; that the keeping of animals and vehicles standing in front of the said stable, and the passing of animals into and out of the same, obstructed the passage of customers to the plaintiff's store; that the dust generated by the tramping of said animals was of great damage to his goods; that there was no fire-place in said stable, but fires were built on the dirt floor, and that from the accumulation of combustibles there there was great danger from fire, etc. The answer was a complete denial of the allegations of the petition as to the injurious character of the defendants' stable, and a justification of their mode of conducting it. A preliminary injunction was awarded, which was afterwards reformed so as to allow the defendants to continue to use their stable by means of a side entrance. At the hearing there was a general verdict for the plaintiff. The court awarded a perpetual injunction against the use of the front entrance of said stable, and the obstruction of the sidewalk with animals and vehicles, and against keeping the stable in a filthy condition or allowing accumulations of manure longer than one day at a time, and also against making

any fires in said stable except in a stove or fire-place. Defendants' motion for a new trial overruled. The defendants then appealed, assigning various errors. The plaintiff also-appealed, on the ground that the defendants should have been perpetually enjoined from keeping a livery-stable in that place.

Hamilton, Oldham, and Sneed, for the defendants.

T. H. DuVal, and Paschals and Stribling, for the plaintiff.

By Court, WHEELER, J. It is not questioned that the allegations of the petition were sufficient to entitle the plaintiff to an injunction. And the revelations of fact which the record contains show that the plaintiff's case was well supported by the proof. We cannot hesitate in coming to the conclusion, from the evidence, that the stable of the defendants was a nuisance.

What constitutes a nuisance is well defined. The word means, literally, annoyance; in law it signifies, according to Blackstone, "anything that worketh hurt, inconvenience, or damage:" 3 Bla. Com. 216. A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another: Id. 215; as, if I have a way annexed to my estate across another man's land, and he obstruct me in the use of it by plowing it up, or laying logs across it, and the like; or if a man should erect his building, without right, so as to obstruct my ancient lights; or keep hogs or other animals so as to incommode his neighbor, and render the air unwholesome: Id.; *Aldred's Case*, 9 Co. 58. "And by consequence, it follows that if one does any other act, in itself lawful, which being done, in that place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will be less offensive—so closely," says Blackstone, "does the law of England enforce that excellent rule of gospel morality, of doing to others as we would they should do unto ourselves:" 3 Bla. Com. 218. To constitute a nuisance, it is not necessary that the annoyance should be of a character to endanger health; but it is sufficient if it occasions that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable: *Callin v. Valentine*, 9 Paige, 576 [38 Am. Dec. 567]; *Coker v. Birge*, 9 Ga. 425, 428 [54 Am. Dec. 347]; *Dargan v. Waddill*, 9 Ired. L. 244 [49 Am. Dec. 421]. Even that which does but cause a well-founded apprehension of danger may be a nuisance. Thus, in *Cheatham v. Shearon*, 1 Swan, 213, 216 [55 Am. Dec. 734], it was held that a powder-house located in a city, and containing stored

therein large quantities of gunpowder, was a nuisance. "When we know," said Judge Green, "that the electric fluid, the irresistible effects of which are disclosed in every thunder-storm, may, in defiance of every precaution, cause it to explode, it cannot be doubted that if five hundred kegs of powder were stored in a magazine in this city every thunder-storm would awaken a universal alarm and consternation in the minds of the inhabitants." And the court pronounced it *per se* a nuisance. So it has been held that building a smith's forge so near another's house, and making such a noise with hammers that the occupants could not sleep: Com. Dig., Action on the Case for Nuisance; and so constructing a livery-stable as to disturb the occupants of an adjacent house by the interminable stamping of horses, day and night, and by noisome smells—is a nuisance: *Dargan v. Waddill*, 9 Ired. L. 244 [49 Am. Dec. 421].

These references show that the plaintiff took upon himself an unnecessary burden of proof by alleging that the stable was annoying and injurious to him in more ways and to a greater extent than was necessary to constitute it a nuisance. Yet there was a general verdict for the plaintiff, maintaining the truth of his averments; and it appears to be well supported by evidence. The charge of the court was not unfavorable to the defendants, and we do not perceive any ground for an appeal on their part in any of the errors they have assigned. The only question is whether the court did not err in refusing a peremptory injunction in favor of the plaintiff, which refusal he has assigned as error.

After the institution of this proceeding the stable appears to have been kept in a less annoying manner than formerly, and the witnesses say, as well as stables are usually kept. Yet the amended petition charged it to have been still a nuisance, and under the pleadings and proof the verdict establishes that it was such, as well after as before the partial dissolution of the injunction, or the partial injunction decreed. The finding of the jury is inconsistent with any other conclusion than that they believed the stable to be a nuisance as then kept. For it was returned under the charge of the court to the effect that a livery-stable is not in itself a nuisance; but whether it be so or not will depend upon the manner of keeping it and other circumstances. It would appear, then, that the only decree which could be legally rendered on the verdict was a perpetual injunction.

It is true, as observed by Chief Justice Ruffin in *Dargan v. Waddill*, 9 Ired. L. 247 [49 Am. Dec. 421], that a livery-stable in a town is not necessarily or *prima facie* a nuisance. Such

erections may be and usually are harmless and useful. But if they be so built, or so kept, or so used, as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value, stables do thereby become nuisances. They are not necessarily so, but may become so; and we think the proof abundantly shows that that of the defendants was in fact so by reason of its locality and construction as well as the manner of keeping it. According to the testimony of the defendants' witnesses, it was as well kept as livery-stables generally are. The defendants did not propose to keep it differently, or profess to be able and willing to undertake the keeping of it in any manner which would be less annoying to the plaintiff. Supposing it possible that a stable, situated and constructed as this is, may be so kept as not to be a nuisance, will this be done? What security has the plaintiff that the care and expense necessary for that purpose will be bestowed? The defendants do not propose it. On the contrary, they insist that it is well kept, and that it is not a nuisance. That is the issue they tender, and on it they rest their case; it has been rightly found against them, and the corresponding judgment must follow.

In *Coker v. Birge*, 10 Ga. 336, which was a bill to enjoin the building of a stable, the defendant, in his answer, insisted that he would take such precautionary measures as to prevent the apprehended danger, by keeping the stable clean, sprinkling lime-water, etc. But the court refused to discharge the *ad interim* interdict, so far as to permit the experiment to be made; because they deemed it improbable that what the defendant proposed would be done: See also *Coker v. Birge*, 9 Ga. 425 [54 Am. Dec. 347].

So in *Callin v. Valentine*, 9 Paige, 575 [38 Am. Dec. 567], where the defendant, by his answer, insisted that he intended to use a slaughter-house in such a manner that it would not be a nuisance to complainants, the chancellor admitted that it was, perhaps, possible to carry on the business to a limited extent in such a manner as that it would not be a nuisance; but he thought it wholly improbable that any one would incur such cost and labor, and therefore refused to dissolve the injunction; and see cases cited in *Coker v. Birge*, *supra*.

Here the defendants' stable, as kept, is a nuisance; and they do not propose to keep it in any other manner which will be less offensive or injurious. Nor does the evidence warrant the belief that, as it is located and constructed, it will or can be so kept as not to be a nuisance.

The principle upon which an injunction is allowed in such cases is, that the injury is such as, from its nature, is not susceptible of being compensated in damages. It is a constantly occurring grievance from day to day and year to year, which, in its nature, is incapable of being estimated in dollars and cents, and cannot be prevented otherwise than by an injunction: 2 Story's Eq. Jur., sec. 925; *Attorney General v. Nichol*, 16 Ves. 341.

Though the defendants should sustain inconvenience and loss, they have no just cause of complaint. They were aware of the plaintiff's objections to their building their stable in that place. Still they persisted, and even went on to enlarge it after the institution of this proceeding. They refused every offer of the plaintiff, either to be at the expense of removing the stable or of building one for them of like dimensions elsewhere. They commenced and consummated the establishment of the nuisance in their own wrong. The maxim of the law is, Use your own rights and property so as not to injure that of another. The legal proposition, consequently, being that if one do an act in itself lawful, which being done in a particular place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will not be injurious to his neighbor: 3 Bla. Com. 218; it was the duty of the defendants to find some other place for their livery-stable where it would not be so injurious or offensive as to deprive others of their accustomed and rightful use and enjoyment of their property.

We are of opinion that the judgment be reformed, so as to render the decree which the court below ought to have rendered; that is, that the injunction be made absolute and perpetual.

Judgment reformed.

NUISANCE, WHAT CONSTITUTES, GENERALLY: See *Callin v. Valentine*, 38 Am. Dec. 567; *Tanner v. Trustees of Albion*, 40 Id. 337; *Fish v. Dodge*, 47 Id. 254; *Coker v. Birge*, 54 Id. 347, and notes thereto.

STABLE AS NUISANCE: See *Dargan v. Waddil*, 49 Am. Dec. 421; *Kirkham v. Handy*, 54 Id. 45; *Coker v. Birge*, Id. 347, and notes. That a stable is not a nuisance *per se* is held, citing the principal case, in *Keiser v. Lovett*, 85 Ind. 242. The case is cited to the same point in *Miller v. Burch*, 32 Tex. 210, where it is held that in such a case, as it is the use of the building, and not the building, which constitutes the nuisance, the destruction of the building to abate the nuisance by a municipal officer is unwarranted: See, on that point, *Barclay v. Commonwealth*, 64 Am. Dec. 715, and cases cited in a note thereto.

DIGNOWITTY v. STATE.

[17 TEXAS, 521.]

FELONIOUS INTENT AT TIME OF TAKING IS ESSENTIAL TO LARCENY; but where one obtains possession of an article merely to look at it, but without intending to steal, and then embezzles it, he is guilty of larceny.

OBLIGOR IN BOND IS GUILTY OF LARCENY IN DESTROYING IT with intent to benefit himself, after having obtained possession of it on pretense of examining it, even though he did not then intend to destroy it, but conceived the design at the moment of the act of destruction.

FELONIOUS INTENT IN LARCENY NEED NOT BE INTENT TO BENEFIT the offender pecuniarily: an intent to serve either himself or another, though not pecuniarily, would be sufficient.

PARTICULAR DESCRIPTION OF THING STOLEN, IN INDICTMENT for larceny, is not necessary, but it is sufficient to describe it specifically by the name usually applied to it.

INDICTMENT FOR LARCENY OF "CERTAIN INSTRUMENT OF WRITING containing evidence of an existing contract for the conveyance of real estate, to wit, a town lot in the city of A.," etc., of a specified value, the property of M. F., sufficiently describes the thing stolen.

PROOF, IN LARCENY, OF GENERAL OR SPECIAL PROPERTY OF OWNER, alleged in the indictment, in the thing stolen, is sufficient to sustain a conviction; as in case of an indictment for stealing a bond, "the property of M. F.," where the proof is that the bond was made to M. F. and her husband, since deceased, leaving a child living.

UNSUPPORTED AFFIDAVIT OF PRISONER FOR NEW TRIAL on the ground of absent testimony is insufficient.

COUNTER-AFFIDAVIT IN RESPONSE TO AFFIDAVIT FOR NEW TRIAL is admissible.

APPEAL from a conviction on an indictment for larceny of "a certain instrument of writing," the property of Matilda Francis. The description in the indictment is sufficiently set out in the syllabus. The evidence was that the writing in question was a bond made by the defendant to the said Matilda Francis and her husband, for the conveyance of a certain town lot in the city of San Antonio; and that the defendant called upon Mrs. Francis and asked to "see that contract," and when it was handed to him he put it in the fire and destroyed it, and afterwards tried to sell the lot to another. Mrs. Francis's husband was dead when the offense was committed, and had one child living. The judge charged the jury that if the prisoner received the writing from Mrs. Francis, and unlawfully destroyed it without her consent, and with a view to benefit himself by depriving her of it, and her interest in it was of the value of twenty dollars, they must find the prisoner guilty. The judge refused certain instructions asked by the prisoner, among others that the jury could not convict unless they should find said writing to

have been the sole property of Mrs. Francis. Verdict of guilty. Motion for new trial and in arrest of judgment overruled, and judgment on the verdict. The motion for a new trial was based upon an affidavit of the prisoner, stating what he could prove by a certain witness who was absent from the state, and whose testimony he was prevented from obtaining by the fact that he was led to believe that one Layer, a witness who testified for the prosecution on the trial, would swear to the same matters. The affidavit was opposed by an affidavit from Layer.

Paschals and Stribling, for the appellant.

Thomas J. Jennings, attorney general, for the state.

By Court, WHEELER, J. The two grounds mainly relied on for reversing the judgment are: 1. The charge of the court; 2. The overruling the motion in arrest of judgment.

Simple larceny is defined to be "the felonious taking and carrying away of the personal goods of another:" 4 Bla. Com. 239. The felonious quality consists in the intention of the prisoner to defraud the owner, and to apply the thing stolen to his own use: *Id.* 232, note 8, Am. ed. from 18th Lond. ed.; Archb. Crim. Pl., 6th ed., 362, note 1, by Waterman. If, therefore, the intention of the accused was, as stated in the charge, to benefit himself by depriving the owner of the property, it was felonious. As to the motive, though the charge does not use the word "felonious" in defining the crime, yet it requires the jury to find the intention of the accused to have been such as necessarily to constitute the taking felonious, if the act of taking was such as, under the circumstances, to constitute the crime of larceny. Was it such? There can scarcely be a possible doubt that the intention of the accused in asking to see the paper was to get possession of it, that he might destroy it. But the charge of the court assumes that it was not essential to constitute the crime that the felonious intent should have existed at the time the accused received the paper from the hand of the witness. And such is the law. The felonious intent is an essential ingredient in the crime of larceny, and it must exist at the time of the taking; for no subsequent felonious intention will render the previous taking felonious: *Id.* But where the offender lawfully acquired the possession of goods, but under a bare charge, the owner still retaining his property in them, the offender will be guilty of larceny at common law in embezzling them.

The principle is thus stated by Mr. Russell, in treating of the cases where it appears the goods were taken by delivery or con-

sent of the owner: "It may, in the first place, be observed, with respect to those cases where the goods are obtained by delivery, that if it appear that although there is a delivery by the owner in fact, yet there is clearly no change of property nor of legal possession, but the legal possession still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made." 2 Russell on Crimes, 21. And the doctrine is illustrated by many adjudged cases. Thus if a master deliver property into the hands of a servant for a special purpose, as to leave it at the house of a friend, or to get change, or deposit with a banker, the servant will be guilty of felony in applying it to his own use; for it still remains in the constructive possession of the owner: 2 Bla. Com. 229, note 3, and numerous cases there cited; Whart. Crim. L., 2d ed., 572; so in the case cited by the attorney general, *People v. Call*, 1 Denio, 120 [43 Am. Dec. 655], where the holder of a promissory note, having received a partial payment from the maker, handed it to him to indorse the payment, and he took it away and refused to give it up, it was held that the possession remained in the owner, and that his subsequent conversion, being found to be felonious, was larceny; that it was not essential that the felonious intent should have existed when the prisoner received the note. "If it came upon him after the note had been received, and while he was making the indorsement, or subsequently," the court said, "and was carried into effect by converting the property to his own use, it was larceny." Id. 124. It was said: "As every larceny includes a trespass, the taking must be from the possession of another. But here it is necessary to discriminate carefully between what constitutes in law a possession of property and that which amounts only to its care and charge." Id. 123. "Where one having only the care, charge, or custody of property for the owner converts it *animo furandi*, it is larceny, the possession, in judgment of law, remaining in the owner until the conversion:" Whart. Crim. L. 572.

The principle is certainly applicable and was rightly applied to the present case. The owner handed the paper to the accused at his request, merely that he might see it. She did not intend to part with the possession. Nor, in judgment of law, was she divested of the possession while the paper remained, for a mere temporary purpose, in the hand of the accused. He merely had the privilege of taking it for the purpose of inspecting it in her presence. And though it seems impossible to doubt that his intention in applying to see it was that he might destroy

it, yet that was not essential to constitute the crime. It was equally larceny if he conceived the intention afterwards, and at the very moment when he did the act.

It is certainly true, as counsel for the-appellant have insisted, that there are cases where the taking amounts to no more than a trespass; as where a man takes another's goods openly before his face, or before other persons, other than by apparent robbery; or having possessed himself of them avows the fact before he is questioned; and where the prisoners entered another's stable at night and took out his horses and rode them a considerable distance, and left them at an inn, and were afterwards found pursuing their journey on foot—on a finding by the jury that the prisoners took the horses merely with intent to ride, and afterwards left them, not intending to return or make any further use of them, it was held trespass and not larceny: 2 East P. C. 662; Whart. Crim. L. 557. In all cases of this description, where the circumstances are such as show that the taking was not with a felonious intent, it will amount to no more than a trespass. But it is otherwise where the taking is accompanied by circumstances which demonstrate a felonious intention, as in the present case: the accused professing a wish to see the witness alone; his pretense that he wished merely to see the paper; the destruction of it in order to enable him to sell the property for a greater sum; his representation to the person to whom he immediately proposed to "sell, that he had got back his bond from Mrs. Francis," evidently intending to suppress and conceal the fact that he had destroyed it against her will, and to create the impression that the contract had been canceled and the bond given up by her consent. The charge of the court fairly submitted to the jury the question of intention; and the circumstances seem to demonstrate that it must have been fraudulent and felonious, beyond a doubt. At least, the jury were well warranted by the evidence in so finding.

The charge required the jury to find that the intention of the accused was to benefit himself. In this it was more favorable to the accused than in strictness he was entitled to ask. There can be no doubt that was his intention; and upon the facts of the case the charge was very proper. But to constitute the felonious intent, it is not necessary that the taking should be done *lucri causa*; taking with an intention to destroy will be sufficient to constitute the offense, if done to serve the offender or another person, though not in a pecuniary way: 2 Russell

on Crimes, 3, 6th Am. from 3d London ed.; 4 Bla. Com. 232, note 8; Archb. Crim. Pl. 362, note 1.

The supposed insufficiency of the indictment, which was the ground of the motion in arrest of judgment, is in that it does not describe, with the requisite certainty, the instrument which was the subject of the larceny. This objection is not tenable. In larceny, the particular quality of the thing, or terms of the contract stolen, do not enter into or constitute an ingredient in the offense. Particular descriptions of the articles stolen are not therefore held to be necessary; if it be described specifically by the name usually applied to it, that will be sufficient. Thus in an indictment for stealing a book, it was held sufficient simply to describe it as a book of a certain value, and that the title of the book need not be stated: *State v. Logan*, 1 Mo. 531; Whart. Crim. L. 430. And in statutory offenses the description given in the law creating the offense has, in general, been deemed sufficient: *Id.* 131. "This doctrine," says Wharton, "is founded partly on the fact that the prosecutor is not considered in possession of the article stolen, and is not therefore enabled to give a minute description; and partly because, notwithstanding the general description, it is made certain to the court from the face of the indictment that a crime has been committed if the facts be true:" *Id.* The indictment describes the instrument by its specific designation in the statute: Hart. Dig., art. 523; and contains all the further certainty of description which the authorities and precedents in similar cases would warrant the court in requiring: *Id.*; Precedents of Indictments, by Wharton, 196, 197, et seq.

Nor is the objection to the conviction tenable, that the proof did not sustain the averment in the indictment, of property in Mrs. Francis. The rule is, that where one person has the general and another a special property in the thing, the property may be averred in the indictment to be in either: *Langford v. State*, 8 Tex. 115. And it follows that proof of either a general or special property in the alleged owner will be sufficient to warrant a conviction. The proof puts it beyond doubt that Mrs. Francis had a property in the contract of value more than sufficient to support the conviction under the statute: Hart. Dig., art. 523.

The application for a new trial, resting on the unsupported affidavit of the party, was manifestly insufficient, though its force had not been impaired by the counter-affidavit, or by anything appearing to the contrary of the matters deposed to

by the accused. Nor was there error in receiving the counter-affidavit: *Hyde v. State*, 16 Tex. 445 [*ante*, p. 630]. There is no error in the judgment, and it is affirmed.

Judgment affirmed.

FELONIOUS INTENT TO CONSTITUTE LARCENY, NECESSITY AND SUFFICIENCY OF: See *Smith v. Shultz*, 32 Am. Dec. 33; *Offutt v. Earlywine*, Id. 40; *People v. Call*, 43 Id. 655; *State v. Hawkins*, 33 Id. 294; *McDaniel v. State*, 47 Id. 93; *State v. Homes*, 57 Id. 269. To the point that a felonious intent is an essential ingredient of this crime, must exist at the time of the taking, and that it is not sufficient if it be found after the taking, see *People v. Call*, 43 Am. Dec. 655; and the note to *State v. Homes*, 57 Id. 273, 275. The principal case is cited to this point in *Loza v. State*, 1 Tex. App. 490; *Quitow v. State*, Id. 69; *Neely v. State*, 8 Id. 66, 67; *Bray v. State*, 41 Tex. 205. If the property be taken under an honest though mistaken claim of right, it is not larceny, but at most only a trespass: *McDaniel v. State*, 47 Am. Dec. 93; *State v. Homes*, 57 Id. 269; *Bray v. State*, 41 Tex. 205; *Neely v. State*, 8 Tex. App. 66, 67, citing the principal case.

LARCENY OF PROPERTY OBTAINED WITH OWNER'S CONSENT and afterwards appropriated: See *People v. Call*, 43 Am. Dec. 655; *State v. Lindenthall*, 57 Id. 743; see also the note to *State v. Homes*, Id. 278 et seq. To the point that property coming into the possession of the accused by lawful means, the subsequent appropriation of it is not theft, but that if the taking though originally lawful was obtained by any false pretext or with any intent to deprive the owner of its value, and appropriate it to the use and benefit of the taker, and it is so appropriated, the accused is guilty of larceny, the principal case is cited in *Hudson v. State*, 16 Tex. App. 229, 230.

DESCRIPTION OF PROPERTY IN INDICTMENT FOR LARCENY, sufficiency of: See *Lord v. State*, 51 Am. Dec. 231; *Engleman v. State*, 52 Id. 494; *Bullock v. State*, 54 Id. 369; *State v. Williams*, Id. 184; *State v. Smart*, 55 Id. 683; *State v. Morey*, 60 Id. 439, and the notes thereto. An indictment for the unlawful branding of a colt, whose owner is unknown, describing it "by its specific designation in the statute," is good, it not appearing that greater certainty is practicable: *State v. Haws*, 41 Tex. 162, citing the principal case.

PROOF OF OWNERSHIP ON INDICTMENT FOR LARCENY: See *State v. Somerville*, 38 Am. Dec. 248.

HENDERSON v. SAN ANTONIO ETC. R. R. Co.

[17 TEXAS, 560.]

STOCKHOLDER MAY SUE CORPORATION for any cause for which any other person might sue, being deemed a stranger to the artificial body created by the charter.

CORPORATION IS LIABLE FOR AGENT'S ACTS, DECLARATIONS, AND FALSE REPRESENTATIONS to the same extent as natural persons.

AGENT'S FRAUD OR MISREPRESENTATIONS WITHOUT PRINCIPAL'S KNOWLEDGE or consent nevertheless invalidate a contract entered into on behalf of the principal by the agent within the scope of his authority; or even where the contract is beyond the agent's authority if the principal rati-

fies it, for he cannot ratify it without assuming responsibility for the fraud entering into it.

FALSE REPRESENTATIONS NEED NOT BE MADE WITH INTENT TO DECEIVE or defraud in order to vitiate a contract; if made through carelessness, mistake, or ignorance, they will have the same effect.

ACT EXTENDING TIME FOR COMPLETING RAILROAD DOES NOT AFFECT CONTRACT entered into with the railroad company, the essential inducement of which was an assurance that the road would be built within a certain time, and failure to complete it within that time discharges the other party to the contract, notwithstanding the extension of time.

CORPORATION CANNOT, ON GROUND OF PUBLIC INTEREST, CLAIM IMMUNITY FOR WRONGFUL ACTS or violations of its contracts, to the prejudice of others, any more than a natural person.

FALSE REPRESENTATIONS BY COMPANY'S AGENT AS TO TIME OF COMPLETING RAILROAD and as to its probable cost, forming the inducement for a contract with it, vitiate such contract, and the company cannot be held excused on the ground that the parties had equal opportunities for knowing the facts.

FALSE REPRESENTATIONS AS TO FUTURE EVENTS will vitiate a contract, where those events depend upon the acts of the party making the representations and form the inducement for the contract.

APPEAL from a judgment for the defendant in a suit brought by the plaintiff to cancel two deeds made by him to one Jones in trust to convey to the San Antonio and Mexican Gulf Railroad Company, the defendant, and certain conveyances made by Jones to the railroad company in pursuance thereof. The condition of one of the trust deeds was that when the company should be fully organized, and should have put twenty miles of road under contract, and should have located the road "so as to cross Cibolo creek above the sulphur springs to San Antonio," then Jones should convey. The condition of the other deed was that Jones should convey that tract to the company when it should be fully organized, and should issue four shares of stock to the plaintiff. The ground upon which the deeds were sought to be canceled was that they were made on the faith of certain representations by an agent of the company to solicit subscriptions, which representations were charged to be false and fraudulent, to the knowledge of the defendant. The representations were that by a certain time work on the road would be commenced; that twenty miles of it would be completed in three years, and that it would cost ten thousand dollars a mile; that the road would be of very great advantage to the plaintiff; and that taking stock in it would be a profitable investment, etc. It was charged and proved that no work of any consequence had been done within the three years towards building the road. Other

points, so far as necessary to the understanding of the case, appear from the opinion

W. B. Leigh, for the appellant.

I. A. and G. W. Paschal, for the appellees.

By Court, *WHEELER, J.* The argument for the appellee questions the right of the plaintiff to maintain the action. He is a stockholder, it is said, and as such cannot sue the company in a suit of this character. If the position were correct, it would result in the affirmance of the judgment, whatever errors may have been committed upon the trial. But the law is otherwise. A private corporation may be sued by one of its own members. This principle is established by numerous decisions, both in the English and American courts: *Campbell v. Maund*, 5 Ad. & El. 866; *Dunston v. Imperial Gaslight Co.*, 3 Barn. & Adol. 125; *Waring v. Catawba Co.*, 2 Bay, 109; *Peirce v. Partridge*, 3 Met. 44; *Marine Bank v. Birge*, 4 Har. & J. 338. In this respect the cases of incorporated companies are entirely dissimilar to those of ordinary copartnerships or unincorporated joint-stock companies. In incorporated companies the individual members are entirely distinct from the artificial body endowed with corporate powers: *Angell & Ames on Corp.*, sec. 390. A member of a corporation, who is a creditor, has the same right of action as any other creditor, and may even attach the property of the company, though he may be personally liable by statute to satisfy other judgments against it: *Peirce v. Partridge*, 3 Met. 44. The individual members of the corporation are deemed strangers to the artificial body created by the act of incorporation, and may maintain their rights of action against the company, of whatever nature, in the same manner as those who are not members. The fact that by his contract the plaintiff was entitled to become, or was in fact, a stockholder or member did not deprive him of his right of action against the company. On general principles, it would seem not to admit of question that one who, by false and fraudulent representations and inducements held out to him by the company, had been deceived and misled into the making of an injurious contract, by which he became a stockholder and member of the company, might maintain an action against it to rescind the contract and dissolve the connection. To deny the right would be subversive of justice."

The plaintiff having the right to maintain the action, it becomes material to inquire whether there be error in the judg-

ment which has been rendered against him. The ground of error mainly relied on is the charge of the court, as follows: "To justify the jury in finding a verdict for the plaintiff on the ground of fraud practiced by the defendant or its agents, they must be satisfied from the evidence that the plaintiff was induced by false representations made to him by said company or by its agent, with their knowledge and authority, to execute the deeds in question; and that these representations were not only false, but that they were made with intent to deceive and defraud the plaintiff."

The charge maintains that to render the company responsible for the frauds practiced by their agents, the false representations must have been made: 1. With the knowledge and authority of the company; and 2. With the intent to deceive and defraud the plaintiff. That both propositions are erroneous will be apparent by a brief reference to authorities.

Story, in his treatise on agency, thus states the law upon the subject of the liability of the principal for the misfeasances, negligences, and torts of his agents, as deduced from the adjudged cases: "It is a general doctrine of law, that although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agents in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even forbade the acts or disapproved of them. In all such cases the rule applies, *respondeat superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealing, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency:" Story on Agency, secs. 452, 127, 135, 137.

The same doctrine applies in respect to the liability of incorporated companies for the acts of their agents. Unless the act of incorporation expressly prescribe the contrary, the duly authorized agents of corporations, as of natural persons, may, within the scope of their authority, not only bind them by their

contracts, but from their acts and conduct, as from the acts or conduct of the agents of natural persons, implications may be made, either for or against their constituents. And if a corporation ratifies the unauthorized act of its agent, the ratification is equal to a previous authority, as in case of natural persons. The representations, declarations, and admissions of the agent of a corporation stand upon the same footing with those of the agent of an individual. As natural persons are liable for wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment, so are corporations, upon the same grounds, in the same manner, and to the same extent. "Indeed," it is said in a learned treatise on corporations, "whether we consider their mode of appointment or of action, their powers, rights, and liabilities, or the liabilities and rights of their constituents, by virtue of their acts or contracts, we can perceive no difference in principle or precedent between the agents of corporations and those of natural persons, unless expressly made by the act of incorporation or by-laws:" Angell & Ames on Corp., secs. 315, 292, 304, 309-311. The defendants, therefore, are to be held responsible for the acts and representations of their agent in the same manner as an individual would be. And nothing is better settled than that the fraud of an authorized agent will invalidate a contract entered into by him on behalf of his principal, though in perpetrating the fraud the agent acted without the knowledge or consent of the principal: *Doe v. Martin*, 4 T. R. 39; *Fitzherbert v. Mather*, 1 Id. 12; *Hill v. Gray*, 1 Stark. 434; *Cornfoot v. Fowke*, 6 Mee. & W. 358. And even though the agent has transcended his authority in making the contract, yet if the principal ratify it, and make the contract his own by availing himself of the benefit of it, he is liable in like manner as if he had personally made the contract. And if the agent has made misrepresentations, the principal is bound by them; for he cannot ratify the contract and avoid the responsibility of the representations, etc., which formed its basis; but he must avoid or ratify the contract *in toto*: Story on Cont., sec. 496.

This doctrine was affirmed by Judge Story in *Hough v. Richardson*, 3 Story, 689, and I quote the language of the learned judge as asserting a principle applicable to the facts of the present case: "The sale, then, being made by Moulton, not as himself the owner—which he was not—but as the agent of the owners, it follows that they are bound by his representations, made at the time touching the sale, as a part of the *res gestæ*;

and as to the purchasers, it makes no difference whether these representations were made by the authority of the owners or not, if they were material to and constituted the basis of the sale, and it was made by the purchaser on the faith and credit of these representations. Under such circumstances, the sale is good in the entirety, or not good at all. The owners have no right to insist upon the validity of the sale independent of the representations. The whole must be taken together as a part of one and the same transaction. It cannot be adopted in part and rejected in part. It must be taken as good for the whole, or not at all." And see *Daniel v. Mitchell*, 1 Id. 172; *Doggett v. Emerson*, 3 Id. 700; *Veazie v. Williams*, Id. 612.

The court therefore erred in charging the jury that in order to set aside the contract on the ground of the fraudulent representations of the agent they must have been made with the knowledge and by authority of the company. The representations of the agent, acting within the scope of his authority and employment, are treated as the representations of the principal himself; and are binding upon him, whether he knew of them or not. And, as we have just seen, though he exceeded his authority in making the contract, yet, as the company, by accepting a conveyance from the trustee and taking the benefit of the contract, have ratified and adopted his acts and made them their own, they are liable in like manner as if they had personally done the acts. They must take them all together, and with all their consequences.

Then, as to the proposition embraced in the charge, that to avoid the contract the false representations must have been made "with the intent to deceive and defraud the plaintiff," the court was equally in error. "If a material misrepresentation be made, although it be not embodied in the contract, it is considered as a constructive or legal fraud, although it be made without any willful intention to deceive, but merely through carelessness, mistake, or ignorance; for if a party be actually deceived by a misrepresentation, the practical result is the same, whether it were a willful fraud or not. If, therefore, a party undertake to make a material statement, not knowing whether it is true or false, and thereby mislead another to his injury, it is no difference that he did not know that the statement was false, since, before making the affirmation, he should have ascertained its truth. But where this representation is purely accidental, and without fraudulent design, it is not necessary to consider it to be a fraud, since, if it be made by mistake, it would avoid

the contract, if it should touch its essence, on the ground of a want of mutual assent of the parties; for if a gross misrepresentation be made as to a material fact, it matters not whether it be treated as a constructive fraud or as a mere mistake, the right of the party deceived to avoid it is the same." Story on Cont., sec. 506, and notes; *Mitchell v. Zimmerman*, 4 Tex. 75. Judge Story, in his treatise on equity, states the doctrine more strongly, thus: "Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know, or believes to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if a party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates a surprise and imposition upon the other party." 1 Story's Eq. Jur., sec. 193.

The charge of the court, therefore, was erroneous, and calculated to mislead. At the instance of the defendant, the court further instructed the jury "that the time limited in the charter for beginning and completing the road having been extended by the legislature, the time limited in the original charter," etc., "was not of the essence of the contract, and the failure to complete the road, or any part of it, within the time does not discharge the party from his contract."

The propriety of giving this instruction is, to say the least, very questionable. In so far as it implies that an extension of time by the legislature could have the effect, as between the company and third persons, of releasing the former from the obligation of their contracts, or could effect the rights of the parties to the contract in question, we cannot assent to the doctrine. If the construction of the road within some certain time was the essential inducement to the making of the contract, if that was the real intention of the contract, and the obligation which it imposed on the defendants, the extension of time by the legislature could not have the effect to discharge the defendants from that obligation. The terms of the contract and the attendant circumstances must be looked to to ascertain the real intention of the parties, and how far time was regarded by them as material. We must suppose it was within their contemplation that the road would be constructed, if not literally within the time stipulated, at least within some reasonable time, regard being had to all the circumstances, and that that expectation was the essential inducement to the contract. It is not

reasonable to suppose that the plaintiff would have made the contract if he had not been led to believe that the road would be constructed, or at least in the process of being constructed, within the time specified or some reasonable time thereafter. It certainly is not a reasonable supposition that it entered into the intention or contemplation of the parties to the contract that the time for its construction might be extended by legislative enactment from time to time indefinitely. Nor can it be reasonably contended that the failure to commence and prosecute the work within a reasonable time, if not within the time specified, would not avoid the contract. That would be to hold a contract binding upon one party when the obligation was not mutual. The charge of the court was calculated to induce the belief that time was not material, when it appeared to have been the essential and sole inducement to the contract, or at least that it was not material so long as the legislature might see proper to extend the time for the making of the road, when such extension of time could have no other effect than, perhaps, to enable the defendants to perform their undertaking within such reasonable time as may be supposed to have been within the contemplation of the parties. It was going too far to tell the jury that because the legislature had given an extension of time, "the failure to complete the road, or any part of it, within the time does not discharge the party from his contract." The instruction was calculated to mislead the jury, and was therefore erroneous.

But the right of the plaintiff to the redress he has sought is denied; and it is said that the charge of the court was correct, for that the public have an interest in these enterprises which rises above the individual rights of a single stockholder; that the public interest forbids that one stockholder should thus discharge himself; that it was not allowable for the court to suppose a case within the law governing individual transactions, and instruct the jury as to the law applicable to the supposed case.

There is no principle known to the law which will enable a party, individual or corporate, to claim immunity for his wrongful acts, done to the injury of another's right, on the ground of public interest. On the contrary, the public, as well as individual interests, demands the utmost fairness and probity in the transactions, as well of corporate bodies as of individuals. Nor does the law recognize any such distinction as that the ordinary rules governing the contracts of individuals do not equally

apply to the case of incorporated companies. They are subject to the same liabilities and responsibilities for their acts and contracts as individuals. We know of no principle upon which they and their agents are to be deemed exempt in their dealings with others from the ordinary obligations of morality and honesty.

Again: it is said it can hardly be predicated that an agent of so extensive a public enterprise could deceive anybody by his opinions as to its completion and cost; that these are matters about which every one is presumed to be equally capable of judging. And the conclusion to be deduced, of course, is that the plaintiff was as capable as the defendants, or their agents, of judging of the truth of the representations; consequently he ought not to have been deceived by them; and if so deceived, it was his own folly, for which he is remediless.

If the defendants or their agent had communicated truly and fully all the facts respecting the cost and character of the work, and their means of accomplishing their undertaking, and left him to judge for himself of the probability of its completion within the time stipulated, instead of making positive statements as to what they could and would do, the argument would be entitled to more weight. But it is certainly reasonable to suppose they best knew the extent of their own means and resources, and when they undertook to give positive assurances upon their own responsibility, we know of no reason why third persons might not trust them; or, if deceived by them to their own injury, why redress should be denied. We cannot assent to the doctrine that no one ought to be deceived by them, because no one ought to trust to their representations; nor are we prepared to hold them irresponsible on any such ground as that their opinions, professions, and assurances ought not to be relied on by third persons with whom they contract.

Again: it is insisted that their representations cannot be deemed fraudulent, for that they had relation to things in the future. But it is not necessary, in order to render the representations and assurances of a party, on which others have acted, binding upon him, that they should have relation to facts which had previously transpired. The representations as to what the defendants would do, when used as inducements to others to contract with them, became assurances and undertakings which they were bound to fulfill. They were obligatory upon them, and must be so held, or the contract would be void for the want of mutuality. If such assurances were not bind-

ing, there could be no binding promise to perform an act in future.

None of the considerations suggested in argument impair the claim and right of the plaintiff to the redress he seeks. They do not obviate the effect of the errors in the charge of the court, or authorize us to consider them as immaterial. The charge was pertinent and material, and must have had a controlling effect in its application to the facts of the case. It appeared in evidence that since the making of the contract the land had appreciated more than fourfold in value. The time specified for having the road completed to the several points indicated (crossings of the Guadalupe and Cibolo) had elapsed, and no part of it had been built; nor had there even been a beginning. There was an attempt to prove a beginning, and it was in evidence that, on the day before the charter would expire, when, as a witness stated, a demonstration had to be made to save the charter, some trifling amount of work had been commenced; there was some brush cut, and some grubbing, and perhaps a furrow or two plowed, estimated to be worth ten dollars; and this, instead of being at the place of beginning, was near San Antonio. But if it had been at the right place, it was not of sufficient importance to be called a beginning of such an undertaking. The defendants are in the enjoyment of the plaintiff's property without having verified any of the professions by which they induced him to part with it; without having rendered any equivalent or consideration whatever. The plaintiff has derived none of the promised benefits to himself from the defendant's undertaking. The contract has operated as a gross imposition and fraud upon him. Such is the state of case which the record exhibits, and it would be difficult to conceive of a stronger case for the rescission of a contract. To hold that a man may be thus deceived, imposed upon, and deprived of his property by false hopes held out to him by another, and that he shall be wholly without redress for the injury done him, would be shocking to common sense and the sense of justice. In fine, to deny the plaintiff's right to redress upon the case which the record presents would be, in effect, to maintain an exemption from legal responsibility on the part of the defendants, which nobody, corporate or politic, not even the state itself, can claim in any country where private rights are respected, and law and justice administered. If the record truly presents the facts of the case, it cannot be denied that the contract has operated a surprise, imposition,

and manifest fraud on the plaintiff, which well entitle him to the redress he seeks; that is, to have the contract rescinded and the property conveyed under it restored to him.

We are of opinion, therefore, that the judgment be reversed, and the cause remanded for a new trial.

Reversed and remanded.

STOCKHOLDER'S RIGHT TO SUE CORPORATION: See *Taylor v. Miami Exporting Co.*, 22 Am. Dec. 785; *Hersey v. Veazie*, 41 Id. 364; *Hodges v. New England Screw Co.*, 53 Id. 624, and notes thereto. ★

LIABILITY OF CORPORATION FOR AGENT'S FRAUD OR TORT: See *Van Hook v. Somerville Mfg. Co.*, 45 Am. Dec. 401; *Vanderbilt v. Richmond T. Co.*, 55 Id. 315; *Lowell v. Boston etc. R. R. Co.*, 34 Id. 33; *Ware v. Barataria etc. Canal Co.*, 35 Id. 189, and notes thereto.

PRINCIPAL'S LIABILITY FOR AGENT'S FRAUDS AND TORTS, GENERALLY: See *Locke v. Stearns*, 35 Am. Dec. 382; *Johnson v. Barber*, 50 Id. 416; *Barber v. Hall*, 60 Id. 301, and notes referring to other cases. To the point that where the agent is acting within the scope of his authority, and behaves so negligently or recklessly as to cause injury to another, the principal is liable, the principal case is cited in *Echols v. Dodge*, 20 Tex. 195.

PRINCIPAL'S LIABILITY FOR FRAUD OR TORT COMMITTED WITHOUT HIS CONSENT or participation: See *Johnson v. Barber*, 50 Am. Dec. 416. That the principal is liable for a fraud committed by his agent without his knowledge in making a purchase pursuant to the authority given, the principal case is cited in *Wright v. Calhoun*, 19 Tex. 420.

RATIFICATION BY PRINCIPAL OF AGENT'S UNAUTHORIZED ACT OR CONTRACT: See *Despatch Line v. Bellamy Mfg. Co.*, 37 Am. Dec. 203; *Bryant v. Moore*, 45 Id. 96; *Wood v. McCain*, 42 Id. 612; *Lee v. Fontaine*, 44 Id. 505; *Juzan v. Toulmin*, Id. 448; *Clealand v. Walker*, 46 Id. 238; *Spofford v. Hobbs*, 48 Id. 521; *Mason v. Caldwell*, Id. 330; *Violet v. Powell*, 52 Id. 548; *McMahan v. McMahan*, 53 Id. 481; *Dord v. Bonnaffee*, 54 Id. 573, and notes thereto. As to ratification by a corporation of unauthorized acts of its agents, see *Planters' Bank v. Sharp*, 43 Id. 470; *Burrill v. Nahant Bank*, 35 Id. 395; *Merchants' Bank v. Central Bank*, 44 Id. 665; *Bank of Alabama v. Comegys*, 46 Id. 278, and notes. That a principal ratifying a sale by his agent makes the contract his own, and must perform it as if he had personally made it, the principal case is cited in *Haldeman v. Chambers*, 19 Tex. 40.

WHETHER MISREPRESENTATION MUST BE WILLFULLY MADE with intent to deceive in order to render a party liable, see *Miller v. Howell*, 32 Am. Dec. 36; *Tryon v. Whitmarsh*, 35 Id. 339; *Lobdell v. Baker*, Id. 358; *Tyson v. Passmore*, 44 Id. 181; *Munroe v. Prichett*, 50 Id. 203; *Mitchell v. Zimmerman*, 51 Id. 717, and notes. To the point that if a party innocently and through mistake misrepresents a material fact in dealing with another, it is equally as conclusive upon him as if done intentionally, because it operates as a surprise and imposition upon the other party, the principal case is cited in *Haldeman v. Chambers*, 19 Tex. 50.

MISREPRESENTATIONS AS TO MATTER EQUALLY OPEN TO BOTH PARTIES: See *Anlerson v. Burnett*, 35 Am. Dec. 425; *Juzan v. Toulmin*, 44 Id. 448; *Mitchell v. Zimmerman*, 51 Id. 717, and notes.

THE PRINCIPAL CASE IS CITED to the point that it is competent to prove fraudulent representations affecting a written contract, though the contract is silent on the subject to which the representations relate, in *Ranger v. Hearne*, 41 Tex. 260. The case is distinguished, on grounds very obscurely stated, in *San Antonio v. Lane*, 32 Id. 414.

CHEEK v. BELLOWS.

[17 TEXAS, 613.]

WIFE, IN HUSBAND'S ABSENCE, HAS IMPLIED AUTHORITY to take care of the community property, and to make contracts respecting it for her own support, where no one else is left in charge of the property.

LEASE BY WIFE OF FUGITIVE FROM JUSTICE who has fled the state, of a hotel which is the joint property of the husband and wife, given for one year for a full consideration, is valid and binding, especially where she is destitute of means, and the rent is necessary for her support.

APPEAL from a judgment for the plaintiffs in an action of forcible entry and detainer. The case is stated in the opinion.

J. W. Harris, for the appellant.

W. T. Rogers, for the appellees.

By Court, LIPSCOMB, J. This was an action brought by appellees against the appellant for a forcible entry and detainer. There were a verdict and judgment for the plaintiffs in the justice's court, and the case was taken by a *certiorari* to the district court, where it was tried, and a like verdict and judgment, from which an appeal was taken to this court.

It appears from the bill of exceptions and statement of facts that the appellees, husband and wife, were the joint owners of a house and appurtenances in the town of Hallettsville, known as the Hicks house, held by them by deed to them jointly; that the husband, being committed to the jail of the county, under a charge of an assault with an intent to commit murder, had broken the jail and made an escape, and it was not known where he had fled; that his wife was unable to keep the tavern, and unable to support herself and children, and was in a condition of great destitution; that under such circumstances she made and executed a lease to the appellant, of the premises, for one year, for a full, valuable, and fair consideration. On the trial, the appellant admitted that he was in possession; and attempted to prove that he was in under the lease of the wife, before described, which was rejected by the court below, on the ground that the wife had no authority to make the lease, to which opinion of the

court the appellant excepted; and this is the only ground of error we propose considering—whether the wife, under such circumstances, could make a valid contract.

As a general rule, the husband has the control and management of both the separate property of the wife and the community property; this will not be controverted; but that this rule is subject to exceptions has been heretofore declared by this court; that there should be exceptions seems to be the result of necessity. In the absence of the husband, leaving no one else authorized to take care of the property, the wife has the implied authority to do so. This was ruled in the case of *Blanchet v. Dugat*, 5 Tex. 507. In that case trespass was brought for removing some of the separate property of the wife, in the absence of the husband, under the direction of the wife; and it was held that the desertion of the wife was a defense to the action. And the doctrine was more fully discussed and emphatically laid down in the subsequent case of *Wright v. Hays*, 10 Id. 130 [60 Am. Dec. 200]. It cannot be doubted that much hardship would result if the wife could in no case make a valid contract in relation to her separate property, or the community property in the absence of her husband. She and her children are entitled to a support from the property; and if the husband is absent, there is no reason nor rule of law that would prohibit the wife from making a contract to meet the necessities of the case. It would be a strong case that would permit her to go further. In this case it cannot be pretended that the contract of the wife went beyond the emergency of her condition. The lease was for only one year, and amply provided for the necessities of herself and her children, and it cannot be permitted to her to repudiate the contract by using her husband's name, and appealing to his rights for him and herself under such circumstances. We believe, therefore, the court erred in rejecting the evidence offered, and for this error the judgment is reversed and the cause remanded.

Reversed and remanded.

POWER OF FEME COVERT TO CONTRACT AS FEME SOLE WHEN ABANDONED BY HUSBAND, or compelled by him to live apart: See *Arthur v. Broadnax*, 37 Am. Dec. 707; *Wright v. Hays*, 60 Id. 200; *Love v. Moynahan*, 63 Id. 306, and notes thereto citing other cases and discussing the subject. In *Sorrel v. Clayton*, 42 Tex. 192, it was held that where a husband was absent in the confederate army, leaving his wife in charge of the plantation, she was not to be deemed "abandoned" by him so as to be personally liable on her contract made in managing the plantation, distinguishing the principal case.

WIFE'S AUTHORITY TO BIND HUSBAND AS AGENT IN HIS ABSENCE: See *Benjamin v. Benjamin*, 39 Am. Dec. 384; *Casteel v. Casteel*, 44 Id. 763; *Felker v. Emerson*, 42 Id. 532; *Walker v. Simpson*, Id. 216, and notes thereto. In *McAfee v. Robertson*, 41 Tex. 358, in a suit for repairs upon a homestead, made at the request of the wife during the protracted absence of her husband, it was held error to instruct the jury that the contract was not binding on the husband unless ratified by him, citing the principal case. As to the wife's power generally to bind the husband as his agent, see *Green v. Sperry*, 42 Am. Dec. 519; *McKinley v. McGregor*, 31 Id. 522; *Northrop v. Graves*, 50 Id. 264; *Portis v. Parker*, 58 Id. 95; *Krebs v. O'Grady*, Id. 312; *Gates v. Brower*, 59 Id. 530, and notes.

MILLER v. ROBERTS.

[18 TEXAS, 16.]

CONTRACT NOT WITHIN STATUTE OF FRAUDS.—A contract by which one person agreed with another that if the latter would transport the former, his family, and their effects, to the state of Texas he would deed to such person one half of the land which would become his by virtue of his immigration, is valid and binding. It is neither within the statute of frauds nor against public policy.

CONTRACT NOT IN ITSELF IMMORAL NOR IN CONTRAVENTION OF ANY LAW, by which the state acquires a citizen, cannot be contrary to its policy.

APPEAL from Dallas county. The following are the allegations of the bill herein necessary to an understanding of the opinion. Petitioner Samuel H. Miller alleges that in 1848 he was residing in Tennessee; that at the same time Roberts was a resident of the same state. That at this time he entered into a contract with Roberts, whereby the latter agreed that if petitioner would convey him and his family into the state of Texas he would give him one half of all the land he should acquire by virtue of his immigration. Petitioner alleges that in faith of this agreement he conveyed Roberts into the state of Texas at an expense of one hundred and fifty dollars; that by virtue of the latter's immigration he obtained as a headright from the state a patent for six hundred and forty acres of land, and that he now refuses to make title to plaintiff to the one half thereof, to his damage in the sum of one thousand dollars. The petition prayed for one half the land, etc. The court sustained a demurrer to this petition, upon the ground that it did not appear therefrom whether the said agreement was in writing or verbal.

J. M. Crockett, for the appellant.

J. J. Good, for the appellee.

By Court, WHEELER, J. The contract set out in the petition was not a contract for the sale of lands. There was no land in particular which was the subject of the contract. It was a contract for the acquisition of land, in which at the time there was not any individual proprietorship. It was analogous to the case of one man furnishing another with funds to purchase land for him, or them jointly. Such a contract creates a trust which is not within the statute of frauds. It was no more a contract for the sale of lands than an agreement to locate land certificates and procure patents for a part of the land when obtained; which is not within the statute of frauds: *Watkins v. Gilkerson*, 10 Tex. 840. Nor was the contract contrary to public policy. A contract not in itself immoral nor in contravention of any law, by which the state acquires a citizen, cannot be contrary to its policy.

We are of opinion that the petition discloses a valid and binding contract, upon which the plaintiff is entitled to maintain his action; and that the court therefore erred in sustaining the demurrer to the petition; for which the judgment must be reversed and the cause remanded for further proceedings.

Reversed and remanded.

BEFORE COURT SHOULD DETERMINE CONTRACT TO BE VOID AS CONTRA-VENING POLICY OF STATE, where the contract is made in good faith, and stipulates for nothing that is *malum in se* or *malum prohibitum*, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical: *Kellogg v. Larkin*, 56 Am. Dec. 164. For cases where certain contracts were held not against public policy, see *Faunce v. Burke*, 55 Id. 519; *Bellows v. Russell*, 51 Id. 238; *Cumberland etc. R. R. Co. v. Baab*, 36 Id. 132; *Hunt v. Test*, 42 Id. 659.

STATUTE OF FRAUDS.—An agreement between the owner of a land certificate and another person that the latter should, at his own expense, locate the certificate and obtain the survey and patent, for which services and outlay he should be entitled to a certain portion of the land, is not a sale of lands within the meaning of the statute, and need not be in writing: *Smock v. Tandy*, 28 Tex. 130; *Gibbons v. Bell*, 45 Id. 417. So the sale of an unlocated land certificate is not within the statute, and need not be proved by writing: *Cox v. Bray*, 28 Id. 247-261. A contract for the acquisition of title to vacant land does not fall within the statute of frauds: *James v. Drake*, 39 Id. 143. The principal case is cited in each of the above cases.

SOYE v. McCALLISTER.

[18 TEXAS, 80.]

WHERE DEED IS MADE TO CERTAIN PERSONS, DESCRIBED THEREIN AS "HEIRS AND LEGAL REPRESENTATIVES of John Soye, deceased," it is *prima facie* evidence that the consideration moved from said deceased, and that the conveyance was made to such grantees, not in their own right, but

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in their representative capacity; as a consequence, such property is subject to the payment of the debts of deceased.

UTTERLY VOID AGREEMENT BY ONE PERSON TO CONVEY CERTAIN LAND TO ANOTHER, or his heirs, may be made use of to ascertain the intention of the former, who has made a deed of such land to such heirs, and to show that the land was conveyed to them as such heirs of deceased; that it was property of his estate, and liable for the payment of his debts.

ABSENCE IN RECORD OF ANY EVIDENCE OF EXTENSION BY COURT OF TERM OF ADMINISTRATION does not invalidate the title of a purchaser who acquired title through him after the extension of his term.

WHERE HUSBAND AND WIFE BOTH DIE ABOUT SAME TIME, owing only community debts, there is no necessity for two administrations upon the same property to pay debts for which such property must have been equally liable in the hands of an administrator of either or both of said decedents.

TRESPASS to try title. The opinion states the facts.

Waul and Wilson, and I. A. and G. W. Paschal, for the appellants.

Denison and Newton, for the appellees.

By Court, WHEELER, J. The plaintiffs, to maintain their action, rely on the conveyance from the original grantee of the government, Delgado, to themselves of the sixth of October, 1838. They insist that the deed vested in them the title exclusive of the rights of creditors of their ancestor; that the land conveyed constituted no part of his estate, and consequently was not subject to sale by his administrator. And to support this view, they rely upon the evidence afforded by the face of the deed itself, the fact that it conveys the land to the plaintiffs by name, for a consideration therein expressed.

But it is seen that in stating the parties to the deed, the plaintiffs, though named as the grantees, are described as the "heirs and legal representatives of John Soye, deceased." The conveyance, being made to them as such, must be deemed *prima facie* evidence that the consideration moved from their ancestor, else why convey to them as his heirs and legal representatives? The manifest intention was, not to convey to them in their own right, irrespective of their ancestor, whom they represented, but in their right in their representative character as the heirs and representatives of their deceased father. The consequence is, that they took the estate, as they did whatever other estate they inherited from their ancestor, subject to the payment of his debts. It became assets in the hands of his administrator.

Such is the *prima facie* conclusion to be deduced from the face of the deed. But it does not rest alone on the proper con-

struction of the instrument. It is in proof that in December, 1833, the plaintiffs' grantor executed to their ancestor an obligation showing a sale to him of the land for a consideration acknowledged to have been received, and agreeing, when the legal inhibition should cease, to make to him a title, or in case of his death to make the title to his widow and heirs. It is unnecessary now to discuss the question whether this agreement was to all intents and purposes null; or was only in so far inoperative and ineffectual as that it could not be enforced unless it was validated by the grantee after the removal of the legal impediment; or unless there were supervening equities which had the effect to make good the title in the purchaser. Whatever theoretical opinion may be entertained of the question, it cannot be denied that, practically, the latter view of it has been maintained: *Hunt v. Robinson*, 1 Tex. 748; *Hunt v. Turner*, 9 Id. 385 [60 Am. Dec. 167]; *Box v. Lawrence*, 14 Id. 545. But though it be utterly void, the agreement is nevertheless a fact which may be looked to to ascertain the motive and consideration which actuated the grantor to make the subsequent conveyance to the plaintiffs. It is equally significant of the intention of the party as if it had been operative and effectual to bind him to its performance.

It is further inferable that the consideration moved from the ancestor from the fact that the plaintiffs were not of sufficient age to contract and make purchases; and that the conveyance was intended to operate in favor of the estate, from the fact that it was so treated by the administrator at the time, and by the plaintiffs themselves, until the bringing of this suit, as appears by the petition in the former suit instituted by them for the land in question. That it was so made and intended in fact is evident, as well from the face of the deed itself, which was matter of legal construction by the court, as from the other facts referred to, which were evidence for the jury. There being nothing in the evidence to countervail the *prima facie* presumption arising from the face of the deed, that the conveyance was virtually and beneficially for the estate, but the contrary, there was no error in the charge of the court upon that subject.

The objections to the validity of the administrator's sale, and the title derived by the defendants under it, have been considered and answered in former decisions, to which it will suffice to refer for their disposition in the present case: *Poor v. Boyce*, 12 Tex. 440; *Howard v. Bennett*, 13 Id. 309; *Dancy v. Sticklinge*, 15 Id. 557; *Burditt v. Silsbee*, Id. 604.

There is an interesting decision lately made by the supreme

court of Georgia, upon the effect which ought to be given to the proceedings of probate courts in the sale of the estates of deceased persons, to which we have been referred by the counsel for the appellants, in another case now before the court. It is admitted that in that case the court went quite as far as this court has gone in maintaining the doctrines which support the titles of fair purchasers at those sales. In a very learned and elaborate opinion by Judge Lumpkin, the legal propriety and necessity of upholding these titles, fairly acquired, are strongly insisted upon, and maintained upon authority and reasons which seem unanswerable: *Tucker v. Harris*, 13 Ga. 1 [58 Am. Dec. 488]. The principal objection to the sale in the present case is that it does not appear that the term of administration was continued down to the period of the sale. The administrator, however, continued to act under the sanction of the probate court; and there is more than the usual apparent regularity in the proceedings in other respects. That the absence in the record of any evidence of the extension by the court of the term of administration does not invalidate the title of the purchaser, has been fully settled in the cases referred to.

It is further objected to the title of the purchaser at the administrator's sale, that there does not appear to have been any administration taken upon the estate of the wife of John Soye. Both departed this life about the same time. The debts for which the property was sold were community debts. Such, at least, is the presumption; and we are of opinion that there was no necessity of two administrations upon the same property, to pay debts for which it must have been equally liable, in the hands of the administrator of either or both of the decedents: *Jones v. Jones*, 15 Tex. 143 [65 Am. Dec. 174]; *Berry v. Young*, Id. 369.

It is unnecessary to revise the several rulings of the court upon instructions to the jury; for the reason that, under the evidence and law of the case, they could not legally have returned a different verdict. There is no error in the judgment, and it is affirmed.

Judgment affirmed.

ALL PRESUMPTIONS ARE IN FAVOR of the regularity of the proceedings of probate courts: *Alexander's Heirs v. Maverick*, *post*, p. 693; *Doolittle v. Holton*, *post*, p. 745; *Sever v. Russell*, 50 Am. Dec. 811. Probate court is clothed with general jurisdiction over testate and intestate estates: *Tucker v. Harris*, 58 Id. 488; *Schultz v. Schultz*, 60 Id. 335. Probate courts are superior courts: *Borden v. State*, 54 Id. 217; and their records, upon all matters required to be recorded

and within their jurisdiction, are evidence of the matters to which they relate: *Remick v. Butterfield*, 64 Id. 316; but see *Clarke v. Perry*, 63 Id. 82.

THE PRINCIPAL CASE IS CITED to the point that land certificates issued to an administrator became assets in his hands, in *Rogers v. Kennard*, 54 Tex. 35, and *Simmons v. Blanchard*, 46 Id. 266. It is cited to the point that a valid sale of community land, made under administration upon the estate of a decedent to pay community debts, passes both the title of deceased and of a wife who survived him, but who died before the grant of letters of administration, in *Murchison v. White*, 54 Id. 78, and *Simmons v. Blanchard*, 46 Id. 266. It is cited in *Blythe v. Esterling*, 20 Tex. 565, where the court hold that a deed to one person as administrator of another, which recites that the grantor had previously sold the land to deceased, and conveys the land to his administrator as part of his estate, shows plainly on its face that it was made to the administrator in trust for the heirs of deceased. In *Marks v. Hill*, 46 Tex. 346, the court say that it would be going beyond any of the reported cases, among which the principal case is enumerated, to hold that an administration granted ten years previous, during which lapse of time no acts appear to have been performed therein, and the record in which fails to show an extension of the administration, was so extended. The court say that the presumption is that it was closed. The principal case is also cited in *Murchison v. White*, 54 Id. 48, where the court hold that when a probate court has opened jurisdiction in a matter of administration, under proceedings apparently regular, the presumption that its jurisdiction properly attached is conclusive on a collateral attack.

ALEXANDER'S HEIRS v. MAVERICK.

[18 TEXAS, 179.]

STATUTE PROVIDING THAT ADMINISTRATOR SHALL NOT BE REQUIRED TO SELL PROPERTY of estate, etc., except upon petition of one of the persons therein mentioned, does not prevent or prohibit him from applying for and obtaining an order for the sale of such property, when necessary for the payment of debts or the settlement of the estate.

VALIDITY OF SALE BY ADMINISTRATOR IS NOT AFFECTED BY FACT THAT RECORD DOES NOT SHOW PETITION for an order therefor. Probate courts are courts of general jurisdiction, and all presumptions are in favor of the validity of their proceedings. The purchaser at such sale was not required to go behind the order therefor. The record must affirmatively show that no petition was made.

IT HAS NEVER BEEN AUTHORITATIVELY DECIDED THAT WRITTEN PETITION WAS NECESSARY TO GIVE PROBATE COURT jurisdiction to order a sale of the property of a deceased person. It seems that its absence would not defeat the jurisdiction of the probate court to order a sale of such property, nor affect the title of a purchaser thereof, who was not bound to look beyond the judgment of a court of competent jurisdiction.

ENTRY IN MINUTES OF PROBATE COURT, THAT ADMINISTRATOR'S FINAL ACCOUNT BE ADMITTED AND FILED, and he discharged upon paying costs, does not amount to a final settlement and discharge. Consequently, where the authority of such an administrator continues to be recognized by the probate court, the order disregarded by all parties, and the ad-

ministration proceeded with, an order of sale made after such entry and order is not void as having been made after the administrator's authority had ceased.

ACTION to clear the title to certain lands. The opinion states the facts.

J. A. and R. Green, for the appellants.

I. A. and G. W. Paschal, for the appellee.

By Court, WHEELER, J. It is insisted on behalf of the appellant that the title of the defendant, which he seeks to have set aside and annulled, is void for want of jurisdiction in the probate court of Bexar county to order the sale.

To the order of sale of the March and April terms, 1843, it is objected that it was made on motion of the administrator, and not upon petition of any creditor, heir, legatee, or next friend of a ward, as provided in the act of the twenty-fifth of February, 1843: Hart. Dig., art. 1067. To the order of the March term of the court, 1844, it is objected that it was made after the administration had been closed, and the functions and powers of the administrator had ceased.

The statute of 1843 does not prohibit the probate court from ordering a sale of the property of the estate, on the petition or application of the administrator. It only provides that he shall not be required to sell the property of the estate, or to render and settle his account, except upon application of a creditor, or some one of the persons mentioned in the act: Hart. Dig., art. 1067. The language of the statute does not import an inhibition on the power of the probate court to order a sale, except upon such application. Nor could it have been intended or contemplated that the succession should be kept open indefinitely, and the administrator not be at liberty to obtain the necessary order for the sale of the property, or have settlement of his accounts, and finally close his administration, unless some of the persons mentioned in the statute should see proper to make application to the court for that purpose. No such consequence could have been intended, or could have entered the legislative mind in enacting this statute. It was simply intended to remove the requisition upon the administrator, imposed by the act of the fifth of February, 1840, by which it was made his duty to petition the court for the sale of all the property of the estate, in a certain event, within a prescribed period: Hart. Dig., art. 1023. Under the act of 1843, he was not required to petition the court for a sale of property, as under the former stat-

ute; but there was nothing to prevent him from applying for and obtaining an order for that purpose, when necessary for the payment of debts or the settlement of the estate. This question was not necessarily involved in the decision of the case in *Miller v. Miller*, 10 Tex. 319, on which counsel for the appellant rely, and was not decided by the court in that case. Nor did the statute of 1843 require that the application to the court for the sale of property should be by petition in writing. And the case, therefore, is not within the principle of the decision in *Finch v. Edmonson*, 9 Id. 504. It has been assumed generally that a petition was necessary to give jurisdiction to the probate court to order a sale of the property of deceased persons, or to call into exercise the jurisdiction of the court over that subject-matter. But the question has not been necessarily involved in the decision of any case, and has not been authoritatively decided. The case of *Finch v. Edmonson*, *supra*, was determined upon the particular provisions of the act of 1846, and the sale was adjudged void on account of fraud, which is always a sufficient ground for setting aside sales, and annulling the most solemn act and judgments of courts, whether of limited or general jurisdiction.

In the case of *Tucker v. Harris*, 13 Ga. 1 [58 Am. Dec. 488], the supreme court of Georgia held their courts of ordinary—constituted as our courts of probate are—courts of general jurisdiction over testate and intestate estates; that their judgments relative to that subject-matter stand upon the same footing as the judgments of any other court of general jurisdiction. “The jurisdiction being established,” the court says, “all presumptions must be made in favor of what does not appear. The court having the right to decide upon the application, the purchaser is not bound to go behind the judgment of the court.” The court quote and approve the case of *Duval's Heirs v. McLoskey*, 1 Ala. 708, where, under a statute of the state of Alabama, which required that the executor or administrator shall “file” a petition in open court prescribing what it shall contain as the initiatory step towards obtaining an order for the sale of the real estate of the testator or intestate, the supreme court of that state held that the order of sale could not be considered invalid, because the record did not show affirmatively that the petition was filed. As the court went on to render its decree, the court held it could not be intended, from the absence of such a paper merely, that it was never filed; but the intendment most rational would be that it was

lost after the rendition of the order. The court also cite the case of *Thompson v. Tolmie*, 2 Pet. 165, where the order of sale was under a statute which provided that if all the parties were minors at the death of the intestate, the estate should not be sold till the oldest arrived of age; and the supreme court held, in effect, that in order to give the court jurisdiction to order the sale, it was not necessary that it should appear affirmatively that one of the heirs had arrived of age; but sustained the jurisdiction because the contrary did not appear by the record. The court said: "It is to be borne in mind that no such fact appears on the face of the proceedings. . . . And how can we say but that the court had satisfactory evidence before it that one of the heirs was of age?"

Judge Lumpkin also cites the case of *Kennedy v. Wachsmuth*, 12 Serg. & R. 171, which he says was decided in the supreme court at Philadelphia, and makes the following quotation and observation upon the case: "The court say, 'Beyond the decree, the purchaser is not bound to look. The inquiries upon ejectment are, Was there an administrator, and order to sell, such as would authorize the administrator to make sale? Was the sale fair?' If so, the settled rule is, *De fide et officio judicis, non recipitur questio*. And it is asserted that no sale in that state ever has been declared void in ejectment against a purchaser *bona fide* for any alleged irregularity in the orphans' court, or because the decree of the court was founded on mistake."

The Georgia court hold that the jurisdiction of the orphans' court existed potentially from the death of the testator or intestate; and they quote upon this subject the language of the supreme court of Pennsylvania, in the case of *McPherson v. Cunniff*, 11 Serg. & R. 422 [14 Am. Dec. 642], cited by us in *Burdett v. Silsbee*, 15 Tex. 617, as follows: "The matter which gives the orphans' court jurisdiction is the death of the owner intestate; for if administration were taken out on the effects of a living man, or of one who died testate, the administration itself would be void, and there could be no administrator to act—no party before the court; consequently all the proceedings would be null. Where an executor obtains payment on a probate of a void will without suit, it cannot be impeached, notwithstanding the probate was afterwards declared null—it being proved on the faith of the act of the judicial tribunal having competent jurisdiction: Toll. Ex. 51. The distinction in this respect is this: a probate of the will of a living person, or a letter of administration on his effects where the person is dead but left a

will, is void *ipso facto*, because there is no jurisdiction; but where the person is dead intestate, the orphans' court have power over his estate, and any one acting on the faith of their judicial acts will be protected." This, it will be seen, is in accordance with the opinion held by us in the case of *Poor v. Boyce*, 12 Tex. 440.

It does not affirmatively appear by the record in this case that the application was not made by a petition in writing. But if it did so appear, I apprehend that it could not, on principle, be held to defeat the probate court of its jurisdiction to order the sale on the application of an administrator; nor could the purchaser be affected by the irregularity, if such it was, in making the order. He was not required to look beyond the judgment of a court of competent jurisdiction.

As respects the order of 1844, though there does appear an entry in the minutes of a court of a former term, that the administrators' final account be admitted and filed, and "he discharged upon paying costs," it is not an absolute and final settlement and discharge. The case, described by its title, thus: "No. 52, Estate of E. Alexander, deceased," was continued upon the docket of the probate court; the authority of the administrator continued to be recognized by the court until after the order and report and approval of the sale of 1844, and his final account of his administration thereafter rendered, and he was finally discharged upon paying costs, with which last order he complied. Notwithstanding the previous entry in the minutes, it was disregarded, and he went on to administer and to close the administration, with the sanction of the probate court, as though it had not been made. It was disregarded by all parties, and it cannot be now invoked to annul the subsequent orders of the court, and his acts thereafter done in the due course of his administration, and thereby defeat the title of a *bona fide* purchaser.

The present is a very different case from that of *Hurt v. Horton*, 12 Tex. 285. There the property was legally sold, and the administration finally closed and settled. Nearly two years after the final settlement and discharge of the administrator, he again applied for and obtained a grant of administration on the estate, without showing any necessity for a renewal of his administration, and proceeded again to sell the same property to another purchaser. The first purchaser protested, but the court proceeded, notwithstanding, to confirm the sale to the second purchaser. It was held, and rightly, that the estate having been fully administered and closed, a second administration upon the

same estate and the same property, which had already been administered upon, was a nullity, and the second sale void. The present is a very different case. The estate was not fully administered, nor the administrator absolutely and finally discharged by the court; but on the contrary, he continued to act as administrator, and the court recognized and approved his acts as such. And upon the repeated decisions of this court, it must be held that the order of sale and sale were effectual to pass the title to the purchaser. There is, therefore, no error in the judgment, and it is affirmed.

Judgment affirmed.

PURCHASER AT ADMINISTRATOR'S SALE of real estate, purchasing without fraud or collusion with the administrator, even if the sale was made without necessity, will be protected in his purchase if made under decree of a court having jurisdiction: *Lynch v. Baxter*, 51 Am. Dec. 735; nor is an order of sale of real estate void because it omits to show that the application for the order was accompanied by the certificate of the judge of probate required by law to be produced with such application: *Jackson v. Astor*, 39 Id. 281; see *Soye v. McCallister*, ante, p. 689.

JURISDICTION TO ORDER SALE OF REALTY DEPENDS ON PETITION AND ACCOUNT: *Bloom v. Burdick*, 37 Am. Dec. 290; see also *Atkins v. Kinnan*, 32 Id. 534.

THE PRINCIPAL CASE IS CITED to the point that a purchaser at an administrator's sale of real estate is not bound to look beyond the order or decree of sale, in *George v. Watson*, 19 Tex. 354-370; *Hudson v. Jurnigan*, 38 Id. 579. It is cited to the point that the act of 1843 does not prohibit the probate court from ordering sale of real property of an intestate, on the application of the administrator of his estate, in *Allen v. Clark*, 21 Id. 404. An order or decree of a probate court confirming an irregular or illegal sale cannot be collaterally inquired into: *Brown v. Christie*, 27 Id. 73; *Trousdale v. Trousdale*, 35 Id. 756. Probate courts are courts of general jurisdiction, and all presumptions are in favor of the validity of their proceedings: *Davis v. Wells*, 37 Id. 606, 610; *Menifee v. Hamilton*, 32 Id. 495-514; *Kleinecke v. Woodward*, 42 Id. 311; *Murchison v. White*, 54 Id. 84. An order of sale which recites that it was made upon petition of the administrator is sufficient, although no petition appears in the record: *Davis v. Touchstone*, 45 Id. 490-496; *Hawley v. Barnard*, 48 Id. 83-87. The principal case is cited in each of the above cases. It is discussed at length and approved in *Guilford v. Love*, 49 Id. 716, upon the question of the jurisdiction of probate courts, and presumptions connected therewith.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

NICHOLS v. NICHOLS.

[28 VERMONT, 228.]

PARTITION, WHO MAY COMPEL.—One holding under a deed of an undivided half of a certain farm, in which deed the grantor reserves a life estate, cannot, during the life of the latter, compel partition against a grantee of the other undivided half of said farm, as a right of immediate possession is necessary to the maintenance of this proceeding.

IN PROCEEDING FOR PARTITION, EVIDENCE THAT CERTAIN DEED UNDER WHICH PETITIONER CLAIMS is void for want of proper delivery is admissible for the purpose of defeating his title and right to maintain the proceeding.

UNDER STATUTE PERMITTING REVIEWS IN "CIVIL CAUSES," PETITION FOR PARTITION cannot be reviewed, as those words have reference only to those suits or actions which are commenced and prosecuted according to the course of the common law.

PROCEEDING for partition. The petitioners at the trial first read in evidence a deed from Dewey Nichols to them for the undivided half of the premises sought to be partitioned. In this deed the grantor reserved the use of the premises conveyed to himself, his wife, and daughter, during their lives. Petitioners next read a deed from Dewey Nichols, dated March 16, 1853, to them of the same premises, to take effect immediately; also a deed from Nichols to the defendants for an undivided half of the premises. It was admitted that Dewey Nichols and his daughter were alive at the time of the trial. Defendants then offered evidence, over the objection of petitioners, tending to show that the above-mentioned deed of March 16, 1853, had never been legally delivered to petitioners, said deed having

been delivered to a third person as an escrow, and by such person unlawfully delivered to petitioners. The jury found for defendants. A review was denied petitioners, and they took this appeal.

H. G. Edson, for the petitioners.

A. O. Aldis and H. R. Beardsley, for the defendants.

By Court, ISHAM, J. This is a petition for partition. The Comp. Stat. 300, sec. 1, 2, provides that "any person having or holding real estate with others as joint tenants, tenants in common, or coparceners, may have partition thereof in the manner therein provided." The petitioners are required to state in their petition the title by which they hold the land, the names of the several owners, as far as known, and give a particular description of the premises. The title of the petitioners may be denied by plea, and an issue may be formed, so that the matter in controversy may be tried as in civil suits. In this case the title of the petitioners to the land, as tenants in common, was denied by the plea. It became necessary, therefore, on the trial of the case before the jury, for the plaintiffs to establish their relation as tenants in common in order to entitle themselves to a partition of the premises.

It appears from the case that on the fourteenth of September, 1850, Dewey Nichols conveyed to the petitioners an undivided half of the farm of which the premises in question are parcel; and that the other undivided half was, by a separate conveyance, conveyed to the petitionees. But in the conveyance of the undivided moiety to the petitioners, Dewey Nichols reserved to himself the use and occupancy of that portion of the farm during his own life, and that of his wife and daughter; and it appears that Dewey Nichols and his daughter are still living. The effect of those several conveyances was to vest in the petitionees a title in fee as tenants in common to one half of the farm, with the right of its present and immediate possession; and to give to Dewey Nichols a life estate in the other half, with the right of possession during the lives of the persons for whose benefit that reservation was made. As between Dewey Nichols and the petitionees, a partition could probably be had. In 2 Lilly's Abr. 357, H, it is said that "partition may be brought by tenants in fee of one moiety against tenants for life of the other moiety:" *Hicks v. Witchell*, Lut. 1018. Those parties have not a unity of title, but they have a unity of possession, and therefore are strictly tenants in common. The petitioners, under their deed,

have no right to the possession, use, or occupancy of the moiety conveyed to them until after the determination of the particular estate which the grantor reserved to himself. They have neither the possession nor the right of possession to any portion of the premises during the life of either of the persons for whose benefit that reservation was made. Under these circumstances, we think that the charge of the court to the jury was correct, "that the deed of Dewey Nichols to the petitioners of September 14, 1850, did not convey to them such a title as would enable them to sustain a petition for partition during the life-time of Dewey Nichols." During the life of Dewey Nichols the petitioners cannot be regarded as having a present estate as tenants in common with the petitionees. There is no unity of possession between them, nor can there be, so long as the petitioners have no right of possession. That relation may exist on the decease of Dewey Nichols, and those for whom that reservation was made, but not until then.

It may not be necessary in all cases that a party have the actual occupation of the premises to entitle him to a partition, for where the possession is not adverse, a constructive possession follows the legal title: *Hawley v. Soper*, 18 Vt. 320. But the petitioners must show a legal title to the land as tenants in common with the petitionees, and the right of immediate possession at the time of presenting the petition, so that actual occupancy of the premises in severalty can be had by the tenants immediately on partition being made. In 4 Kent's Com. 380, note, it is said that "it was the ancient doctrine, under the statute of Henry VIII., that no persons could be made parties to a writ of partition, or be affected by it, but such as were entitled to the present possession of their share in severalty." In the case of *Burhans v. Burhans*, 2 Barb. Ch. 398, it was held that "a party applying for a partition of lands must not only have a present estate in the premises as a joint tenant, or tenant in common, but he must have also the actual or constructive possession of his undivided share or interest in the premises." In *Brownell v. Brownell*, 19 Wend. 367, it was held that "proceedings in partition, under the statute, can be instituted only by a party who has an estate entitling him to immediate possession." The same rule was recognized in New Jersey, in *Stevens v. Enders*, 13 N. J. L. 271; and in Connecticut, in the case of *Culver v. Culver*, 2 Root, 278, where a widow was seised of a life estate, with a remainder to those persons who were parties to the proceeding for partition. The court observed that "it will be time

enough for them to have partition of the lands when they shall have the possession and title." In *Packard v. Packard*, 16 Pick. 191, the same rule was recognized, that a petition for partition could not be sustained when the parties had only a reversionary interest, and not a vested estate in possession: *Barnard v. Pope*, 14 Mass. 434 [7 Am. Dec. 225]; *In re Hodgkinson et ux*, 12 Pick. 374. The same doctrine is held in Pennsylvania, *Ziegler v. Grim*, 6 Watts, 106, and in the case of *Brown v. Brown*, 8 N. H. 93, where it was held that "a petition for partition cannot be maintained by one who has only an interest in a reversion or remainder, after a life estate." The reason upon which that doctrine is founded is obvious. In 2 Lilly's Abr. 356, E, the rule is given that "a partition of lands ought to be made according to the quality and the true value of the lands, and not according to the quantity or number of acres." If a just and equitable partition of these premises were now to be made, that partition may be unjust and unequal when, upon the decease of Dewey Nichols, these parties have a vested estate in possession. For that reason, we think this petition cannot now be sustained.

The evidence offered in relation to the deed of March 16, 1853, was manifestly properly received. That deed, without that evidence, would have given to the petitioners a present estate in fee, as tenants in common with the petitionees. The effect of the evidence offered was to defeat the title of the petitioners under it. The title of the petitioners to this land was then left to stand on the deed of Dewey Nichols, of September 14, 1850, which we have considered as not giving to the petitioners that title and right of possession which entitles them to a partition of these premises.

We are satisfied, also, that the court were correct in deciding that, under our statute, this case could not be reviewed. The right of review, with few exceptions, is given by statute in all civil causes. The words "civil causes" have reference only to those suits or actions which are commenced and prosecuted according to the course of the common law. That was obviously the meaning of the court in the case of *Borden v. Brown*, 7 Mass. 93, in which they observed that "reviews are provided for only when the original action is commenced by writ." In that case a review was denied on a petition for partition of lands. At common law, no proceedings could be had to compel a partition, as between joint tenants, or tenants in common, for those estates were created by the act of the parties. The statute authorizes this proceeding, and directs the mode of pro-

cedure in making partition. The same reasons for not allowing a review in actions on book, in the action of account, or declarations for betterments, and various other cases of similar character, exist in this case. It is a statutory proceeding, and not a civil cause prosecuted according to the course of common law.

The result is, that the judgment of the county court must be affirmed.

WHO MAY COMPEL PARTITION.—At common law, the only form of co-tenancy which might be dissolved by one or more of the co-tenants enforcing partition was coparcenary. But the hardship and inconvenience of this restriction was early felt in England, and by the statute of 31 Hen. VIII., c. 1, this remedy was extended to joint tenants and tenants in common of any estate of inheritance in their own right, or in the right of their wives. By the statute of 32 Hen. VIII., c. 32, an enlargement was made upon this enactment, by which joint tenants and tenants in common, for term of life or years, or joint tenants and tenants in common, where one or some of them have estate for term of life or years, with the others that have estate of inheritance or freehold, were empowered to exercise this privilege: Allnatt on Partition, 56; 2 Bla. Com., Cooley's ed., 187; Id., Kerr's ed., 161; Broom & Had. Com. 71; *Cole v. Aylott*, Lit. 300. Statutes of similar import to the English statutes above mentioned exist in most of the states in the American Union, and the question has often occurred as to when persons under certain circumstances, or occupying particular relations, were sufficiently within their terms to enable them to take advantage of their provisions empowering them to compel partition. A short discussion of this question will be here attempted.

PETITIONER MUST HAVE RIGHT TO POSSESSION. In nearly all of the United States it is a necessary prerequisite to the maintenance of an action for the partition of lands that the petitioner have, at the time of the commencement of his action, an actual or constructive possession, in common with the defendants, of the land sought to be partitioned. Both title and possession, or the right of possession, must be vested in the petitioner: *Schori v. Stephens*, 62 Ind. 441; *Florence v. Hopkins*, 46 N. Y. 182; *Hughes v. Hughes*, 63 How. Pr. 408; *Chapin v. Sears*, 18 Fed. Rep. 814; *Sullivan v. Sullivan*, 66 N. Y. 37; *Brownell v. Brownell*, 19 Wend. 367; *Hoyle v. Hughson*, 1 Dev. 348; *Whitten v. Whitten*, 36 N. H. 332; see next subdivision.

Remaindermen or Reversioners cannot Compel. A legitimate application of this rule to the case of reversioners and remaindermen would prevent their maintaining proceedings to enforce partition, and such is unquestionably the law. This is the doctrine of the principal case, and it is supported by *Schori v. Stephens*, 62 Ind. 441; *Hughes v. Hughes*, 63 How. Pr. 408; *Tabler v. Wiseman*, 2 Ohio St. 209; *Sullivan v. Sullivan*, 66 N. Y. 37. In this latter case the court say: "There are obvious reasons why a remainderman should not, especially as against tenants in possession, whether of a term for years, for life, or in fee, be entitled to institute the proceeding. Any partition which might be made at his instance, although equal when made, might be very unequal when his estate should vest in possession. So, too, if actual partition could not be made, and a sale should be necessary, the tenant having a less estate than a fee might be deprived of the substantial benefit of his terms."

Co-tenant whose Share is Rented may Compel Partition. An application of the rule requiring the petitioner to have a present right of entry before maintaining this proceeding led the court of Massachusetts to deny its sanction to its maintenance by a co-tenant whose share had been leased to a tenant who was in possession: *Hunnewell v. Taylor*, 6 Cush. 474. "But probably the weight of authority is the other way:" Freeman on Cotenancy and Partition, sec. 446. Such a co-tenant was permitted to compel partition in *Woodworth v. Campbell*, 5 Paige, 518; *Cook v. Webb*, 19 Minn. 172; and *Hunt v. Hazelton*, 5 N. H. 216; S. C., 20 Am. Dec. 575. A partition in such a case will, of course, be made subject to the rights of the lessee: *Id.* So an unexpired lease from the petitioner to his co-tenant does not prevent his enforcing partition: *Id.*

Right to Enter for Condition Broken Insufficient. To maintain a proceeding for partition, the applicant must show a present right of possession; it is not sufficient to show a right to enter for condition broken. "The right of a party who is entitled to take advantage of a condition broken seems a much more slender title than that of a reversioner. He has but a right to enter, of which he may or may not take advantage; and if he waives the forfeiture, as he may, the partition would be without effect:" *Whitten v. Whitten*, 36 N. H. 326; see *O'Dougherty v. Aldrich*, 5 Denio, 388.

PETITIONER MUST NOT BE DISSEISED. In order to maintain a proceeding for compulsory partition, the petitioner must show a tenancy in common with the respondents, and must establish an actual or constructive possession by himself. The proceeding of partition was never intended as an alternative for the action of ejectment, nor as a means of trial of hostile or adverse claims to real property. Consequently, in most of the American states partition cannot be compelled of lands held adversely, or the title to which is in dispute; the legal title must first be established. Where the co-tenant has been ousted or his rights totally denied by his co-tenant, his remedy is by ejectment, in which he may recover his just proportion of the land: *Maltair v. Payne*, 15 Fla. 683; *London v. Overby*, 40 Ark. 155; *Therasson v. White*, 52 How. Pr. 62; *Spright v. Waldron*, 51 Miss. 356; *Shearer v. Winston*, 33 Miss. 149; *Van Scuyver v. Mulford*, 59 N. Y. 426; *O'Dougherty v. Aldrich*, 5 Denio, 388; *Adams v. Ames I. Co.*, 24 Conn. 235; *Florence v. Hopkins*, 46 N. Y. 186; *Beebe v. Griffing*, 14 Id. 238; *Jenkins v. Van Stunack*, 3 Paige, 245; *Witherspoon v. Dunlap*, Harper, 390; *Clapp v. Bromaghan*, 9 Cow. 561; *Drew v. Clemmons*, 2 Jones Eq. 312; *Giffard v. Williams*, L. R. 5 Ch. 546; *Thomas v. Garvan*, 4 Dev. 224; S. C., 25 Am. Dec. 708; *Burnhans v. Burnhans*, 2 Barb. Ch. 405; *Rozier v. Johnson*, 35 Mo. 331; *Longwell v. Bently*, 3 Grant Cas. 177; *McMasters v. Carothers*, 1 Pa. St. 325; *Fordler v. Davis*, 38 Mo. 107; *Gravier v. Ivory*, 34 Mo. 523; *Law v. Patterson*, 1 Watts & S. 184; *Abberjollie v. Chaplin*, 10 Rich. Eq. 428; *Bonner v. The Proprietors*, 7 Mass. 475; *Matthewson v. Johnson*, Hoffm. Ch. 560; Freeman on Cotenancy and Partition, sec. 447. "The principle is too plain to need authority, that tenants in common cannot procure a partition or sale of property while out of possession. They must obtain possession before they can sustain a bill for partition:" *Drew v. Clemmons*, 2 Jones Eq. 314.

Duration or Character of Adverse Claim Immaterial. In *Brock v. Eastman*, 28 Vt. 658, *post*, p. 733, the court say: "In cases where a privity has existed between the parties, as in the case of joint tenants or tenants in common, and one tenant ousts his co-tenant by taking the whole profits to himself, denying his co-tenant's right, such a possession may be treated as a disseisin, for the purpose of bringing ejectment; or he may elect to treat such possession of his

co-tenant as his possession, and in that event may maintain a petition for partition. But it would seem from the authorities, if the party in such a case is effectually disseised, they no longer hold the estate together, and he is barred of his remedy for partition." Mr. Freeman, with convincing force, denies the existence of any such distinction as this. He says: "We deny that a possession held by one co-tenant so adversely and exclusively that he is thereby made liable to an action of ejectment differs in degree or character from the possession by which he may defeat a petition for partition. Disseisin and ouster are terms having the same signification in partition as in ejectment." Freeman on Cotenancy and Partition, sec. 447. In perfect harmony with this view is the expression of the court that "it would be utterly incongruous to hold that where ejectment would lie the plaintiff has possession which would entitle him to bring partition:" *Florence v. Hopkins*, 46 N. Y. 186. Adverse possession within the meaning of partition proceedings is subject to the operation of the general rule that the possession of one co-tenant is presumed to be the possession of all, and that possession is presumed to follow the legal title; but when an adverse claim or possession is shown, its duration or extent is immaterial. "An adverse holding by one tenant in common for any length of time, however short, previous to the institution of an action of partition, will bar a recovery in such form of action:" *McMasters v. Carothers*, 1 Pa. St. 324. It "is clear that an adverse holding of the property by the defendant for twenty-one days before the bringing of the action would be as effectual to defeat the plaintiffs in this action as an adverse holding for twenty-one years would be. The right of the plaintiffs below to recover turned entirely upon the point of their holding together with the defendant at the time the action was commenced, and not upon their unity of possession, or having held together for any previous length of time:" *Law v. Patterson*, 1 Watts & S. 193. The duration of an adverse possession "cannot be material in determining where the possession was at the time of the commencement of the action:" *Florence v. Hopkins*, 46 N. Y. 186.

Unoccupied Lands.—The rule under discussion, requiring possession on the part of petitioner, does not extend to unoccupied or vacant lands. The law, in such a case, casts the seisin upon, and implies the possession of, the persons holding the legal title, and this presumption continues until an adverse possession is shown by the respondents. There can be no adverse possession under the circumstances, and those having the legal title would in law be seised of the land in such sense that they would be entitled to a partition: *Byers v. Danley*, 27 Ark. 96; *Beebe v. Griffing*, 14 N. Y. 238; *London v. Overby*, 40 Ark. 155; *Florence v. Hopkins*, 46 N. Y. 186.

Petition may be Retained by Court until Legal Title is Settled. When it is made to appear that the proceeding for partition cannot be maintained, or the relief prayed for granted, because of the disseisin of the petitioner, or because of a dispute in the title, the court may retain the bill pending proceedings for the settlement of the legal title. The court in *Chapin v. Sears*, 18 Fed. Rep. 814, say, in such a case, that upon reflection they are of the opinion that the proper course "is to order the present bill to stand as a simple partition bill, and to give leave to complainant, if he is in the peaceable possession of the premises, to institute another suit under the provisions of the state statute to ascertain and determine the title to the land." So in *London v. Overby*, 40 Ark. 156, the court say, in a similar case: "The court might, instead of dismissing, have retained the bill for a reasonable time, with liberty to the plaintiff to bring such action as he might be advised to establish his title. But this was a matter of discretion." A different course

of procedure is advised in *Burhans v. Burhans*, 2 Barb. Ch. 398. The court there say that the proper course is to dismiss the bill as prematurely filed, without prejudice to the complainant's right to institute a new suit for partition after he shall have established his legal title by the proper action.

IN SOME STATES DISSEIZED CO-TENANT, OR ONE OUT OF POSSESSION, MAY COMPEL PARTITION. The rule that a co-tenant who has been disseized or who is out of possession cannot maintain proceedings to compel partition, is not of universal application in all the states of the Union. A notable exception to this rule occurs on Massachusetts, and a decision in that state, *Barnard v. Pope*, 14 Mass. 436, is responsible for much of the heresy that prevails in the other dissenting states. This case, however, read in any light, is not strongly in favor of the rule it is so often cited as supporting, viz., that a disseized or disposed co-tenant may compel partition; and for all that appears from its report, it may have been, and probably was, decided in recognition and conformity with the general rule requiring seisin and possession on the part of the petitioner. In this case, although the court say, after comments upon a decision, that they think it cannot be inferred that an actual corporal seisin is necessary in order to maintain the proceeding, and that if this were so it would too much restrict the remedy of partition, continue: "It is true that by the common law and the English statutes the writ of partition cannot be maintained by one tenant in common who is disseized; not even if the disseisin be by the co-tenant." They then proceed to discuss the question of seisin of co-tenants, applying the general rule that the possession of one is presumed to be the possession of all, and it is out of their conclusions upon the question of disseisin that the confusion in this case arose. They conclude, however, by saying that there "has been no actual ouster" in this case. If their decision was based upon this fact, it was in conformity with the current authorities. However this may be, the illustrious Chief Justice Shaw, in *Marshall v. Crehere*, 13 Met. 462, upon the authority of *Barnard v. Pope*, *supra*, goes the whole length of saying that an effectually disseized co-tenant, having a right of entry, may maintain compulsory partition proceedings, and this under a more stringent statute than existed when the former case was decided.

So now in Massachusetts, in order to maintain such proceedings, "the petitioner's seisin in fact need not be proved:" *Wood v. Le Baron*, 8 Cush. 474. This is also the settled law of Maine, the court in that state, in *Baylies v. Bussay*, 5 Me. 137, saying: "Considering, therefore, that such was the acknowledged law of Massachusetts at the time of our separation from that commonwealth, no sound reason can be given why this court should adopt a different principle." See also *Call v. Baker*, 12 Id. 325. The rule cannot be said to be the same in New Hampshire. The case of *Miller v. Dennett*, 6 N. H. 114, is hardly an authority for the proposition that actual possession is unnecessary to the maintenance of partition proceedings; certainly not when read in connection with *Brown v. Brown*, 8 Id. 95, and *Whitten v. Whitten*, 36 Id. 326. In Ohio a right of entry will entitle a party to maintain partition without the actual seisin required in most of the states: *Tabler v. Wiseman*, 2 Ohio St. 207; such appears to be the law in Minnesota: *Cook v. Webb*, 19 Minn. 170; and possibly in Illinois: *Howey v. Goings*, 13 Ill. 107; S. C., 54 Am. Dec. 427. In Kansas the disseisin of petitioner does not bar his right to compel partition; possession is not a necessary prerequisite, and a mere right of entry is sufficient. This is under the code, and the reasoning of the court, accounting for their departure from the general rule, is very satisfactory. They say: "Under our statutes, the action of partition is legal as well as equitable, and the action of ejectment is equitable as well as

legal. The same court has jurisdiction of both actions, and the two actions may be united in the same proceeding, as we have heretofore seen. Therefore, whatever may have been the reason at one time for refusing to partition land where the plaintiff was not in the possession thereof, no such reason now exists; and when the reason for any particular rule ceases, so does the rule itself cease:" *Scarborough v. Smith*, 18 Kan. 399-408. This is also the settled law of California under her code system: *Martin v. Walker*, 58 Cal. 590; *Noce v. Daveggio*, 3 West Coast Rep. 491. In the language of the polished Chief Justice Sanderson: "Such is one of the fruits of the new system of practice which we have adopted, and when contrasted with the practice in such cases at common law, serves to illustrate its superiority:" *De Uprey v. De Uprey*, 27 Cal. 335. In Indiana, in *Godfrey v. Godfrey*, 17 Ind. 9, similar reasoning is adopted; but see *Schori v. Stephens*, 62 Id. 448. The federal cases of *Cuyler v. Ferrill*, 1 Abb. C. C. 182, and *Parker v. Kane*, 22 How. 1, incline to the opinion that in states where common-law and chancery jurisdiction are blended in the same tribunal, partition proceedings should be entertained, although the title to the property sought to be aparted is in dispute, and the petitioner is not in possession.

WHEN EQUITY WILL DECREE PARTITION, ALTHOUGH PREMISES HELD ADVERSELY.—An apparently well-established exception to the general rule-denying a petitioner's right to compel partition when the defendant is in the adverse possession of the premises is the case of a petitioner who applies to a court of equity for the exercise of its beneficent jurisdiction to establish his title, to construe a will, etc., and for partition. In such a case, where "the plaintiff has an equitable title, and asks the aid of the court of equity to establish it, if the court ascertain that he has an interest, and what that interest is, the doctrine that partition cannot be had when the defendant is in the adverse possession of the premises does not apply. The decree establishes plaintiff's title, and under it the court may put him in possession, and a suit in ejectment becomes unnecessary. The court, having acquired jurisdiction of the cause, may proceed to determine the whole controversy by decreeing a partition of the premises:" *Dameron v. Jameson*, 71 Mo. 100; *Rozier v. Griffith*, 31 Id. 171; *Scott v. Guernsey*, 60 Barb. 163; *Hosford v. Mervin*, 5 Id. 62; *Howey v. Goings*, 13 Ill. 108; S. C., 54 Am. Dec. 427; *Overton's Heirs v. Woolfskill*, 6 Dana, 373; Freeman on Cotenancy and Partition, sec. 449.

PERSONAL PROPERTY HELD ADVERSELY CAN BE PARTITIONED. The general rule preventing the maintenance of partition proceedings, where the defendant holds adversely, does not apply to personal property. This is so because, unlike disputes concerning the title to real estate, one co-tenant of personal property cannot maintain an action at law to try or establish his title against his co-tenant while the latter remains in possession of the property: *Smith v. Dunn*, 28 Ala. 316; *Weeks v. Weeks*, 5 Ired. Eq. 111; S. C., 47 Am. Dec. 358; *Edwards v. Bennett*, 10 Ired. 361; Freeman on Cotenancy and Partition, sec. 448.

TRANSFER OF RIGHT TO PARTITION.—A co tenant who has conveyed away his share in the common property is not entitled to partition under any circumstances or for any purpose: *King v. Howard*, 27 Mo. 21. The entire right to maintain such a proceeding passes to his grantee: *Hill v. Jones*, 65 Ala. 214. An alienee of an heir is entitled to partition in the same manner as the heir: *Stewart's Appeal*, 56 Pa. St. 241; *Regan's Estate*, 7 Watts, 438. So the transferee of an undivided interest in a homestead by a husband and wife may compel its partition by any means provided by law: *Ferguson v. Reed*, 45 Tex. 574.

In Case of Conveyance for Benefit of Creditors.—In *Van Arsedale v. Drake*, 2 Barb. 599, the petitioners were seised of a life estate in real property by virtue of an assignment to them by one of several tenants in common, in trust for the benefit of his creditors. The court held that they had such an estate as would support the proceeding. But this power was denied in *Ritchie v. Munder*, 49 Md. 10. The deed of assignment in this case, for the uses, trusts, intents, and purposes therein specified, empowered the trustees "to sell the property belonging to the parties," etc. The court say: "The deed empowered the trustees to sell the property of the parties therein mentioned, according to their best discretion, for the benefit of the trust; but it did not authorize them to institute such a proceeding as this to cause the interest of other parties in the same property to be also sold."

Judgment Creditor Who has Levied his Execution upon an undivided interest in land belonging to his judgment debtor cannot compel partition. "The debtor has a right to redeem the land levied upon within a year, and ought to be enabled to redeem without being subjected to the expenses that may be incurred in a process for partition. The statute contemplates a redemption of the property in the same condition in which it was levied upon:—" *Newton Bank v. Hull*, 10 Allen, 144. To the same effect: *Phelps v. Palmer*, 15 Gray, 499; *Freeman on Cotenancy and Partition*, sec. 451; *Ewer v. Hobbs*, 5 Met. 6.

MORTGAGORS AND MORTGAGEES.—"A mortgagor continuing in possession, and before the entry of the mortgage for condition broken, has the right to compel a partition. But the partition is binding only on his interest, and cannot prejudice the mortgagee:—" *Freeman on Cotenancy and Partition*, sec. 452; *Colton v. Smith*, 11 Pick. 311; S. C., 22 Am. Dec. 375; *Call v. Baker*, 12 Me. 237; *Watten v. Copeland*, 7 Johns. Ch. 140; *Bradley v. Fuller*, 23 Pick. 1. Upon this point the supreme court of Maine say: "Nor can the fact that some of the petitioners have conveyed their interest in mortgage be interposed by the respondent to prevent their share from being assigned to them. Between the parties to a mortgage and their assigns the title is in the mortgagee or his assigns, but with respect to strangers to the mortgage, the mortgagor in possession is regarded as the owner of the estate, and so seised as to enable him to convey it, or to maintain a real action counting upon his own seisin:—" *Upham v. Bradley*, 17 Me. 427. But where the mortgagor has mortgaged his interest to his co-tenant, he cannot enforce partition. "Whether the petition for partition be regarded as a real action in which the title is drawn in question, or as a suit for possession, it is an adversary suit, and the mortgagee has both the legal title and the right of possession as against the mortgagor and those who claim under him. A bill to redeem is the proper remedy, and after redemption a petition for partition may be sustained:—" *Bradley v. Fuller*, and *Fuller v. Bradley*, 23 Pick. 9; *Blodgett v. Hildreth*, 8 Allen, 186. The mortgagee in such a case was allowed partition in equity, in *Green v. Arnold*, 11 R. I. 364; but it appears that the mortgagor consented to the arrangement.

In *Rich v. Lord*, 18 Pick. 327, Chief Justice Shaw held that a mortgagee of an undivided moiety by virtue of his mortgage acquired such a legal seisin and possession—the possession of his mortgagor and the latter's co-tenants being his possession—as would entitle him to maintain partition. He does not discuss the question, speaks of it as one presenting no great difficulty, and cites no authority for so holding. But the later case of *Ewer v. Hobbs*, 5 Met. 3, may be taken as denying this doctrine. In discussing the nature of a mortgage and the estate created thereby, this same illustrious judge, after stating that the first great object thereof is to effectually secure a debt, says:

"The next is to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first purpose, that of securing the mortgagee." And again he says: "But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in all other respects dealt with as the estate of the mortgagor." It appears to us that these views are incompatible with the former decision. There appears to be no doubt that until an absolute foreclosure a mortgagee has no such estate as will entitle him to maintain partition proceedings: *Jones on Mortgages*, secs. 705, 706; *Phelps v. Townsley*, 10 Allen, 554; *Norcross v. Norcross*, 105 Mass. 265. An entry to foreclose at the permission of the mortgagor before condition broken is insufficient: *Norcross v. Norcross*, *supra*.

EQUITABLE TITLE.—"As a general rule, an equitable title will not be recognized nor protected outside of a court of equity. Except in the case of a mortgagor, a party seeking to assert rights in a suit at law for a partition must base his claim upon a legal title." Freeman on Cotenancy and Partition, sec. 453. An equitable title is insufficient: *McCabe v. Hunter*, 7 Mo. 356; *Hopkins v. Toel*, 4 Humph. 40; *Coale v. Barney*, 1 Gill & J. 341; *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116. This, we apprehend, is but a special application of the general rule requiring an undisputed seisin and title, and possession on the part of the petitioner, and is subject to the operation of the rule laid down in the above subdivision, entitled "When Equity will Decree Partition, although Premises Held Adversely." In Pennsylvania, however, the rule is different, and an equitable title is sufficient: *Willing v. Brown*, 7 Serg. & R. 466. This is so from necessity, as in that state they have no courts of chancery, and if the equitable title could not be thus asserted, it would be without protection.

ADMINISTRATORS.—An administrator of an estate which is shown to be insolvent has no such seisin or interest in the land of such estate as entitles him to partition: *Nason v. Willard*, 2 Mass. 478. In such a case, the right to partition vests in the heirs. "Their right to partition is not affected by the circumstance that the administrator, if the estate is insolvent, is entitled to the rents and profits pending the administration; not that he has the right by a license from the court of probate to sell the property for the payment of debts:" *Kelley v. Kelley*, 41 N. H. 502. In Massachusetts the court has no authority, upon the death of a petitioner for partition, pending the final determination of the matter, to appoint his administrator to prosecute the case: *Richards v. Richards*, 136 Mass. 126.

TENANTS FOR LIFE OR FOR YEARS.—It is universally established in the United States, under the different state statutes, that a tenant for years or for life may compel partition between himself and his co-tenants. "The statute seems to have been designed to authorize partition among those 'holding,' 'owning,' or 'having title to' land; and it does not appear to have been held in any case that an ownership in fee was necessary, or that an estate for life was not sufficient:" *Shaw v. Beers*, 84 Ind. 528; *Swain v. Hardin*, 64 Id. 85; *Russell v. Russell*, 48 Id. 456; *Ackley v. Dygert*, 33 Barb. 189; *Van Arsdale v. Drake*, 2 Id. 600; *Brevoort v. Brevoort*, 70 N. Y. 139; *Jenkins v. Fahey*, 73 Id. 355. Partition may be had on petition of tenant for years, although the tenant of the other part of the premises holds the same in fee: *Mussey v. Sanborn*, 15 Mass. 155. The same appears to have been held in *Shaw v. Beers*, 84 Ind. 528. One who holds a life estate determinable upon his marriage, in one fifth of an estate, may enforce partition against his co-tenants

who own the other four fifths, and the reversion of his own fifth: *Hobson v. Sherwood*, 4 Beav. 184; see *Freeman on Cotenancy and Partition*, sec. 455.

TENANTS BY CURTESY AND IN DOWER.—A tenant by the curtesy has such an estate as will entitle him to maintain proceedings to compel partition: *Olry v. McAlpine*, 2 Gratt. 340; *Riker v. Darke*, 4 Edw. Ch. 668; and see *Darlington's Appropriation*, 13 Pa. St. 430; *Walker v. Dilworth*, 2 Dall. 257; *Weise v. Welch*, 30 N. J. Eq. 431; *Freeman on Cotenancy and Partition*, sec. 456. But it is otherwise with tenant in dower. A widow having a right of dower in land is not a tenant in common with the owners of the land, and consequently cannot maintain partition proceedings: *Wood v. Clute*, 1 Sandf. Ch. 199; *Coles v. Coles*, 15 Johns. 320; S. C., 8 Am. Dec. 231; *Ward v. Gardner*, 112 Mass. 42; *Leonard v. Molley*, 75 Me. 418.

INFANTS.—It appears at the present time to be settled law that an infant may, in an appropriate manner, be made a party complainant, or may be the sole party complainant in a compulsory partition proceeding. This is of course so only in the absence of a statutory prohibition: *Shull v. Kennon*, 12 Ind. 34; *Freeman v. Freeman*, 9 Heisk. 301; *Mitchell v. Jones*, 50 Mo. 438; *Goudy v. Shank*, 8 Ohio, 415; *Zirkle v. McCue*, 28 Gratt. 517; *Cocks v. Simmons*, 57 Miss. 183; *Wilson v. Duncan*, 44 Id. 642; *Burks v. Burks*, 7 Baxt. 353; *Wagh v. Blumenthal*, 28 Mo. 462; *Lurned v. Renshaw*, 37 Id. 458. "That any of the parties are minors is a reason why the court should be careful to guard their interests, but is no reason why the right should be denied to them, when upon satisfactory evidence it is shown to be to their interest that the partition, or sale instead of a partition, should be made:" *Freeman v. Freeman*, 9 Heisk. 306. In *Jonson v. Noble*, 24 Mo. 252, the supreme court of Missouri denied the application of a minor, by his next friend, for partition, upon the ground that such proceedings were usually brought for infants for the purpose of defrauding them, or procuring an unjust division of their property. That infants might be made parties defendant was no reason why they should be allowed to be complainants, as in the absence of ability to totally check an evil its existence should be restricted. This decision was shortly afterwards overruled by *Thornton v. Thornton*, 27 Id. 307, where the court said: "It is the duty of every minister of the law to watch with jealous care the rights of infants; but human wisdom has not yet succeeded in providing a shield that will protect the weak and innocent against the strong and the crafty, and it is not perceived how infants are more exposed to robbery or treachery when they are plaintiffs than when they are defendants. If an infant has no other means of support but an undivided interest in real estate, it is often of great importance to him to have the power of forcing a partition, and of securing the separate enjoyment of his share, for while it is held in common with an obstinate cotenant it would not be productive in yielding a ground-rent, or in any other manner; and to deny him the right to have a partition would drive him to wait, or to an application to the county court for the sale of his interest, and in that way produce the very result dictated by the cupidity of his tenant in common."

Mr. Freeman lays down the rule governing the granting of partition at the prayer of an infant in the following language: "But doubtless an application for partition is not, when made by or on behalf of an infant co-tenant, to be granted as in the case of an adult co-tenant, as a matter of course. An adult has, when not fettered by special obligations existing independent of the cotenancy, an absolute right to partition; and the court to which the application is properly presented has no authority to consider whether the further

continuance of the co-tenancy would prove more or less advantageous than a partition. But the protection of infants is one of the duties with which courts of equity are specially charged. When the court to which an application for partition is presented on behalf of an infant is a court of equity, or one authorized in matters of partition to exercise a chancery jurisdiction, it not only may, but ought to, inquire whether the proposed partition will operate to the prejudice or to the benefit of the infant petitioner; and if, as the result of such inquiry, the conclusion reached is that the partition will not prove beneficial, it ought to be denied." Freeman on Cotenancy and Partition, sec. 457. *Hartmann v. Hartmann*, 59 Ill. 104, is an illustration of the application of these views.

MARRIED WOMEN.—A married woman maintaining partition should join her husband with her, unless by the law of the state where the proceeding is brought she is empowered to sue alone in matters relating to her separate property. If she sues alone, the partition will be imperfect, as failing to extinguish her husband's estate in the property, although it might bind her interest: Freeman on Cotenancy and Partition, sec. 458; *Spring v. Sandford*, 7 Paige, 550-555. Where husband and wife are co-tenants, they, it is said, cannot compel partition, one against the other, because they constitute adverse parties, and the proceeding to compel partition being an adversary one, this is an insurmountable obstacle. Neither can they join in a petition: *Hovee v. Blandon*, 21 Vt. 321; see *Marston v. Ward*, 35 Tex. 798. But a married woman may maintain the proceeding against her husband in a court of equity: *Moore v. Moore*, 47 N. Y. 468.

NUMBER OF CO-TENANTS MAY JOIN IN PETITION FOR PARTITION. That two or more co-tenants may unite as petitioners in a proceeding to compel partition against their remaining co-tenants has never been doubted. Those so uniting may have their several shares set off to them, to be held together and undivided: Freeman on Cotenancy and Partition, sec. 459; *Ladd v. Perley*, 18 N. H. 396; *Upham v. Bradley*, 17 Me. 427; *Choteau v. Paul*, 2 Mo. 263. But the right of all the co-tenants to unite in one petition has been questioned. In *Sweet v. Bussey*, 7 Mass. 503, the court refused to permit a partition to be thus made, saying that if the parties are qualified in point of age and mental capacity to maintain the petition, they are competent to effect partition among themselves. "The statute plainly implies that this process is only maintainable where the applicant has a share only, and the respondent, or some other person not applying, has an interest respecting which the partition by this process will be conclusive, to some purposes at least, after due notice." The language of the supreme court of Missouri is very similar. "The statute contemplates that in suits for partition there should be a plaintiff and a defendant. In all suits at common law there must be an actor and a *reus*. If parties come in voluntarily and ask the court to make a partition among them, and it is done, they will stand afterwards just as they did before the court interfered, so far as judicial sanction is concerned." *Bompert v. Boderman*, 24 Mo. 399. But the authority of this latter case was short-lived, for it was overruled by *Waugh v. Blumenthal*, 28 Id. 464, and *Larned v. Renshaw*, 37 Id. 462. The reasoning of these latter cases is very sound, and their doctrine, i. e., that all the co-tenants may unite in a proceeding to secure a partition of their common estate, seems the most consonant with modern practice. Under the peculiar provisions of the Alabama code the probate court has no jurisdiction to decree partition where the land sought to be apportioned is not susceptible of division into equal parts, or parts of equal value. Consequently, where the parties own unequal interests, as where one

has purchased the share of one of his co tenants, the partition cannot be made: *Ward v. Corbett*, 72 Ala. 438.

PETITIONER MUST BE ENTITLED, AT TIME OF FILING PETITION. "It is material that the applicant should be entitled to partition at the time when his demand for it was made. If a reversioner file a bill for partition, it must be dismissed, notwithstanding the fact that before the hearing he purchased the life estate, and thereby acquired an interest entitling him to partition:" Freeman on Cotenancy and Partition, sec. 460. A co-tenant who, at the filing of his petition, has no right of entry or possession, but who acquires such right pending the hearing, cannot have judgment of partition. The fact that he acquired such right in the interval between the filing of the petition and the hearing "cannot affect the rights of the parties, which must be determined upon the facts as they stood when the process was instituted:" *Hunnewell v. Taylor*, 6 Cush. 476; see also *Phelps v. Palmer*, 15 Gray, 501. But the supreme court of Vermont sustained a petition for partition filed before the petitioner's right became perfect, upon the ground that process had not been served until after that time: *Hawley v. Soper*, 18 Vt. 322.

PROVISIONS IN DEEDS AND WILLS AFFECTING RIGHT TO DEMAND PARTITION.—A petitioner for partition became entitled to his undivided share of the premises under a deed which contained the clause "to remain in common and undivided," inserted at the close of the description. This was held not to amount to a condition or a covenant, and not to affect the petitioner's right to a partition: *Spaulding v. Woodward*, 53 N. H. 573; and the fact that the petitioner's vendor retained a lien for the purchase price upon his undivided share of the common property does not affect his right to claim partition: *Hall v. Morris*, 13 Bush, 322. Where a will provides when a division of the estate shall take place, partition thereof cannot be had at an earlier day: *Hill v. Jones*, 65 Ala. 214; and under a will to three persons for life, remainder to such of their children as should be living at the death of the above persons, the land cannot be partitioned, those taking in remainder not being ascertained: *Williams v. Hassell*, 74 N. C. 434. Under a will which first makes provision for the payment of certain legacies out of an estate, and then provides that the net income of the residue is to be paid equally to the sons and daughters of deceased during their lives, remainder to their children, the court held that the residuary estate was held on a continuing and active trust, and that a partition of the same could not be had, although the same might appear practicable: *Outcalt v. Appleby*, 36 N. J. Eq. 73.

CESTUI QUE TRUST CANNOT COMPEL PARTITION. A *cestui que trust* cannot maintain proceedings to compel partition. "Such an action can only be maintained by some one having an estate or interest in the land. The parties must hold and be in possession of 'lands, tenements, and hereditaments as joint tenants or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years.' Here the plaintiff has no estate whatever. Her husband's will, under which she claims, and which is part of the record, creates in her favor nothing but a trust. The realty is not devised to her and her daughter for their respective lives with remainder over to the latter's children. The devise is explicitly to the trustees, and the entire estate is vested in them subject to the execution of the trust. It is quite clear, therefore, that there could be no partition at the suit of a mere *cestui que trust*, nor could the express trust created by the will be nullified by a sale under a judicial decree in such an action:" *Harris v. Larkin*, 22 Hun, 489. So a conveyance by a trustee to a *cestui que trust* which does not extinguish the trust gives the latter no *status* to maintain an action for partition: *Thebaud v. Schemerhorn*, 10 Abb. N. C. 72.

GILMAN v. ANDRUS.

[28 VERMONT, 241.]

WHERE WIFE PURCHASES SET OF MINERAL TEETH, AND HER HUSBAND PERMITS HER TO KEEP THEM after he discovers that she has made the purchase, and does not repudiate the contract, this raises an implied contract on his part to pay for them what they are reasonably worth.

THIS was an action upon a book-account. The opinion states the facts.

Edson and Aldis, for the defendant.

G. F. Houghton and H. R. Beardsley, for the plaintiff.

By Court, ISHAM, J. The only matter in dispute in this case is in relation to item No. 5 in the plaintiff's account, it being for a plate of mineral teeth prepared for the defendant's wife. The auditor has found that the plaintiff rendered the service, and that the charge is reasonable in amount, but that no express promise has ever been made by the defendant to pay the account. The question arises whether one will be implied.

The plate was furnished while the defendant and his wife were living together, and was suitable to the defendant's circumstances and station in life. It is expressly found that the defendant permitted his wife to keep the plate after it came to his knowledge that she had procured it of the plaintiff. The fact that the defendant did not then repudiate the contract, and cause the plate to be returned, will render him liable for what it was reasonably worth. In *Waithman v. Wakefield*, 1 Camp. 121, Lord Ellenborough held that, "where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value." Cohabitation itself furnishes presumptive evidence of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate: 2 Smith's Lead. Cas. 372. The assent of the husband arising from that circumstance may be rebutted; but nothing existed in this case at the time the plate was furnished that affected that presumption. The plaintiff, from the previous dealings which he had had with the defendant, had reason to believe that the wife was authorized to contract for the plate. It is stated by the auditor that the plaintiff had been previously, and shortly before the plate was contracted for, employed by the defendant's wife as a dentist, for which services the defendant does not dispute his liability. The defendant also had a previous

conversation with the plaintiff in relation to furnishing the plate, in which the defendant told him that he should have the work done as soon as he was able. Those circumstances, in connection with the fact that he has permitted his wife to retain the plate during the whole period of their cohabitation, are sufficient to show her authority to make the purchase, and the defendant's liability; even if the plate could not strictly be treated as necessities. We are satisfied, however, that the defendant is liable upon either of those grounds.

The judgment of the county court is affirmed.

HUSBAND, BY NOT RETURNING GOODS ORDERED by his wife, may adopt her purchase of them. He must dissent from her contract, if known to him, in order to avoid responsibility for it: *Mackinley v. McGregor*, 31 Am. Dec. 522, and note.

COMMERCIAL BANK OF ALBANY v. STRONG.

[28 VERMONT, 316.]

NOTICE TO INDORSER MUST BE SENT TO PLACE OF HIS RESIDENCE, UNLESS HE IS SHOWN TO HAVE his place of business elsewhere. A notice sent to him at one place, at which a corporation of which he was president had its office, when he resided at another, is not sufficient, in the absence of proof that the former was his place of private business.

DEPOSIT OF NOTICE OF DISHONOR OF BILL IN POST-OFFICE DOES NOT HAVE TO BE SHOWN by a single witness who can swear positively that he so deposited it. All who had anything to do about the matter of depositing the notice should be called, and if their united testimony shows that it was deposited, that is sufficient.

PROOF OF DEPOSIT OF NOTICE IN POST-OFFICE.—One clerk in a bank testified that he inclosed a notice of the dishonor and protest of a bill of exchange in an envelope addressed to defendant, and placed it on his desk, from whence it was the duty of either one of two other clerks to take letters to the post-office; also that at a later hour of the day the letter was gone. The other clerks testified that it was their duty to take all letters from this desk; that they invariably did so, and that if they took this notice they immediately put it in the post-office. The defendant was shown to have received the notice, but at what time does not appear. *Held*, that these facts show that the notice was mailed in time.

ASSUMPSIT against the defendant as an indorser of a bill of exchange. The evidence at the trial, going to show notice to the defendant of the protest of the bill, was substantially as follows: William D. Case, a clerk in the Commercial Bank, testified that it was his duty to keep a record of protests, and to send notices to the parties to the protested paper. That on the twentieth of

June, 1854, there were received at the bank several notices of protest intended for the parties to the paper which is the subject of this suit; that on the forenoon of that day he inclosed one of said notices in an envelope and addressed it to "George W. Strong, Rutland, Vermont;" that he laid said envelope so addressed on his desk, to be taken to the post-office. That it was the special duty of E. W. Belden to take all letters so placed to the post-office daily; that in the absence of Belden, J. P. White took the letters; and that in the afternoon of this day the letter was gone. Belden and White being sworn, testified as to their duty to take letters placed as this one was to the post-office, and of their invariable practice to do so; also that if they took the letter mentioned on that day they took it to the office on the same day. The court rendered judgment for defendants, to which plaintiff takes exceptions.

B. F. Langdon and E. N. Briggs, for the plaintiffs.

C. L. Williams and L. C. Kellogg, for the defendant.

By Court, REDFIELD, C. J. This is an action upon a bill or draft against the defendant as indorser. The only question made in the case is in regard to the proof of notice of dishonor to the defendant. The case being tried in the court below, without the intervention of the jury, some question has been made upon the bill of exceptions, whether any question of the sufficiency of the evidence of notice is properly before this court. But as the testimony is detailed very much at length, and the court say they "found the facts proved as stated in the testimony of the witnesses," and also that upon the foregoing evidence, which is certified to be all the evidence given upon this point, they decided that "there was not sufficient proof of notice to the defendant to charge him as indorser," we can only conclude that they did refer to the character and competency of the proof, and not to the quantity; to the quality rather than the amount and force of the evidence in convincing the mind.

We must, then, see what was the character of the evidence given.

1. We do not think there is any doubt as to the particular notices sent, either from New York, where the bill was made payable, and where it was protested, or from Albany, where the bill seems first to have been negotiated. It is obvious that the notice, having the New York City post-mark upon it, and which is addressed to the defendant in the double capacity of president of the Rutland and Washington Railroad, on whose behalf he

drew the bill, and also as indorser in his private and personal capacity, was sent by the notary protesting the bill direct from New York to West Poultney, where the railroad office seems to have been kept. But as the defendant, at the time, had his residence in Rutland, we do not regard a notice addressed to him at West Poultney sufficient to charge him as indorser, there being nothing to show that he had any private business place at West Poultney. No case of that character has been shown to us, and the general course of decision is, certainly, that notice to an indorser must be sent to the place of his residence, unless he is shown to have his place of business elsewhere. There may be cases, where one has different places of business, that notice addressed to either is sufficient. But although the defendant is not shown here to have any particular place of business in Rutland, distinct from his dwelling, yet, as he had no place of private business out of Rutland, his dwelling was his place of business, to which notice should be addressed to charge him as indorser.

2. We think it is obvious that the notary, having sent this double notice direct from New York, would not have probably sent another addressed to the defendant, at the same place, as indorser only. The strong probability is, that he sent two distinct notices to Albany for the defendant, one as drawer, on behalf of the railroad, and the other as indorser only. These being put into each other, and the outside one addressed upon the back West Poultney, Case, the teller, doubtless took them to the cashier, in the manner he testifies, and learning the residence of the defendant, marked it upon the inside one, which happens to be the one addressed to the defendant as president, etc. But most undoubtedly both were sent to Rutland by Case, in the manner testified, as there is no other reasonable mode of accounting for their being in the possession of the defendant, or indeed, of their being made by the notary, in addition to the double one already sent. The teller, indeed, calls it one notice, and it was so, in some sense, being to one person, but in two quite different capacities. The teller might not have recollected precisely the facts, but it must have been so to account for his own memorandum upon one of these notices, and also his entry of the notice sent to the defendant as indorser, upon the notice sent to the Commercial Bank, and produced upon the trial, with the memorandum of the notice sent to Strong as indorser.

3. The question is reduced, then, to the narrow point whether there was sufficient evidence that the notice to the defendant, as

indorser, which Case testifies he inclosed in an envelope, and addressed to the defendant at Rutland, and which the county court finds to be true, and which there is no reason to question, and which he also says he laid upon his desk, and which was afterwards, on the same day, gone from the desk, was really shown to have been deposited in the post-office at Albany in season for the mail of the next day. As it was gone from the desk the same day, the only question would seem to be whether the proof is sufficient to show that it went from the desk directly into the post-office. For if so, that will charge the defendant, although the notice never reached him. After that the conveyance is at his own risk. And if it did not go direct to the post-office, there is no certainty how long it might have been delayed, or indeed, whether it ever reached the defendant, except that he had it in possession many months after.

The cases are undoubtedly very strict upon this point, as they should be, in requiring very great certainty of proof of depositing the notice in the post-office. But the cases certainly do not require that this should be proved by a single witness, who can swear positively that he deposited the notice in the proper place. This, in practice in large commercial cities, where the vast majority of such cases arise, would seem not generally to be the course of doing such things. The depositing of such letters in the post-office, as of other notices, is, perhaps, more generally done in such places by porters and messengers. But it would seem to be the rule that all who had anything to do about the matter of depositing the notice should be called. Is this shown to have been done in the present case?

It would seem from the testimony that this bank had a cashier and three clerks to transact the business. There is nothing to indicate that any other persons had anything to do with sending notices of dishonor of bills and notes generally, or in this case in particular. From the fact that Case was upon the stand, and that the uncertainty of this notice was made a leading point in the trial, we may fairly presume, perhaps, that if there had been others, having probable connection with the transaction, whose testimony was not taken by the plaintiffs, which would very much tend to increase the uncertainty, we should have been apprised of that fact.

From the testimony of Case, it seems that it was the special duty of Case, the first clerk, to make out and deposit in the post-office, or see that it was done, all such notices. The cashier does not seem to have had any connection with this notice,

or to have been expected, ordinarily, to have anything to do with such notices, except probably to give directions when applied to by Case, as in the present case. It was the daily and special duty of Belden, the youngest clerk, to take all letters from the bank to the post-office, and in his absence the same duty devolved upon White, the next older clerk, and in the absence of both, the duty devolved upon Case. None but the officers of the bank had access to Case's desk. The letter was deposited in the proper place for them to take to the post-office, or where they often took them. They both testify that at this date it was their business, in the manner and order stated by Case, to carry letters from the bank to the post-office, and that they often took letters from Case's desk for that purpose, and that if they took any letter on that day or any other, they carried it to the post-office the same day. There is no pretense of any motive, in any officer of the bank, to detain the letter, or that they would be liable to do so by mistake, or indeed, that any others but those named had access at the time to the desk of Case, although it is probable the directors must have had. But the probability of their carrying off such a letter by design or mistake is quite too remote to be taken into the account. It is, perhaps, quite as probable that one of the clerks might have lost it upon the way to the post-office, without being aware of the loss, and really suppose he delivered it at the post-office, and that is not a contingency which is ever taken into the account of uncertainties in such cases.

We may say here, then, safely, that all the persons having any connection with the business of depositing the letters of this bank, at that time, in the post-office, or who would be likely, upon any rational conjecture, either by design or mistake, to take such letter from the desk, have testified explicitly that if they did take it up from the desk they deposited it in the post-office the same day. In addition to this, the notice is found to have reached the defendant at some time. And we have before said, if the letter had been dropped by mistake, or purloined, it would, in all rational probability, never have reached its destination. Can there be, then, any longer any reasonable doubt of the deposit of this letter in the post-office the same day it was written? We think not. The evidence rises to a sufficient degree of certainty to answer any demand, even in a criminal court, if it be of the proper quality.

The authorities relied upon to show this was not the case do not seem to us to establish any such proposition.

The proposition in Mr. Chitty's treatise upon bills, that it is incumbent upon the holder "to prove distinctly, and by positive evidence, that due notice was given, and that it cannot be left to inference or presumption," seems to be based altogether upon the case of *Lawson v. Sherwood*, 1 Stark. 314, a mere *nisi prius* decision. The language of the author seems to be taken from the case. But the case seems to justify no such rule of proof as to cases generally of this kind. The witness there testified that he gave notice in either two or three days, three days not being in time, which is no testimony at all of the fact of legal notice. It leaves the probabilities precisely equal whether notice was given or not, which is precisely no proof at all. Any one who knew nothing about the case might safely testify that he either did give notice or did not, which is this case as reported.

And the next proposition of the same author is equally unsupported by the cases referred to. It is that "the party who puts a letter giving notice of the dishonor of a bill into the post-office must be able to swear to a certainty, and not doubtfully, that he put the letter in himself, and not that he was doubtful whether he did not deliver it to another clerk to put it in." The case referred to is *Hawkes v. Salter*, 4 Bing. 715. The difficulty here was, that the witness could not swear whether he put the letter in the post-office or another clerk did it, and the testimony of the other clerk was not taken in the case; so that there was in fact no testimony to connect the letter with the office. And the case of *Tocsey v. Williams*, 1 Moo. & M. 129, although more in point for the defendant, as it seems to me, than any other cited is by Lord Tenterden put upon the ground that after the letter was copied by the clerk it had to go into the defendants' hands to be sealed, and there was nothing in the case to show that he ever returned it to the clerk whose business it was to convey it to the post-office, and who testified very much as the two younger clerks do here. But here the letter is shown to a moral certainty to have been taken by the clerks, and they testify, if they took it they deposited it in the post-office the same day. The case of the *Bank of Vergennes v. Cameron*, 7 Barb. 143, a note of which was read to us, seems to be a case where there was no proof of notice, except the notice being in the indorser's hands after the time for giving it had expired. It could not from that be inferred, of course, that it was given in time. But in the present case it is shown that if the notice was ever deposited in the office, it was done in

time, and the notice being in the defendant's hands is strong confirmation of the notice having reached the office in due time.

On the other hand, the reasoning of Lord Ellenborough, in *Hetherington v. Kemp*, 4 Camp. 193, whose opinions are always regarded as good evidence of the law, shows very fully that the evidence in the present case ought to be regarded as sufficient. "Had you called the porter," says his lordship, "and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done." "A letter was then put in from the defendant," acknowledging the receipt of a letter of the proper date from the plaintiff, and Lord Ellenborough said he would presume this was the letter written to inform him of the dishonor of the bill, although nothing was said of that in the defendant's letter.

The case of *Miller v. Hackley*, 5 Johns. 375 [4 Am. Dec. 372], is a case where far more uncertain evidence than the present was held sufficient.

In this last case the witness, being the notary who protested the bill, only testified that it was his usual course to send notices by mail deposited on the evening of the same day of protest, and that he believed he did so in the present case, and it was held sufficient. We think there is no question the proof in the present case should have been held competent to prove notice to the defendant of the dishonor.

Judgment reversed and case remanded.

NOTICE OF DISHONOR OF NOTES AND BILL, HOW AND WHERE SERVED: See full discussion of this question in note to *Ransom v. Mack*, 38 Am. Dec. 607.

PROOF OF POSTING NOTICE OF DISHONOR: See *Weekly v. Bell*, 36 Am. Dec. 116; *Miller v. Hackley*, 4 Id. 372; *Hoff v. Baldwin*, 13 Id. 385, and notes. It may be proved by showing that it was placed where letters were customarily placed for the postman, and that when letters were so placed they were invariably taken by him: *Skilbeck v. Garbett*, 7 Ad. & El., N. S., 846; *Brailsford v. Williams*, 15 Md. 150; *Flack v. Green*, 3 Gill & J. 474.

McDANIELS v. ROBINSON.

[28 VERMONT, 387.]

BY LEAVING HORSE WITH INNKEEPER AFTER GUEST HAS DEPARTED, RELATION OF INNKEEPER and guest is not continued so as to render the former liable as such for a sum of money left with him by the latter while stopping at his house.

IF PERSON LEAVE AT INN PROPERTY WHICH INNKEEPER CAN DERIVE NO GAIN FROM KEEPING, it is termed "dead property," and if he goes away himself, and the property is stolen in his absence, he has no action against his host, for the reason that he was not a guest at the time.

ASSUMPSIT for four thousand dollars. It appears that from a time before the twenty-sixth of February until after the sixth of March, 1851, defendant was an innkeeper. On the first-mentioned date plaintiff came to defendant's house to stop, and brought with him a horse and wagon, which defendant received and put in his stable and kept until the evening of March 6th. Plaintiff showed that he delivered to defendant, on the evening of March 5th, a bag of money, containing two hundred double-eagles, to be kept by him during that night. Plaintiff claimed that defendant held this money in the character of an innkeeper, and subject to the liabilities of that relation. Defendant gave evidence showing that the money had been burglariously stolen from his possession. He gave other evidence tending to show the care and vigilance he had exercised in keeping it. He also introduced evidence tending to show that immediately after plaintiff delivered the money to him he left the inn without any intention to return; that he intended to terminate his personal stay there, and that he lodged with his brother on that night. Plaintiff requested the court to charge the jury that the fact that his horse remained in keeping at the defendant's stable from February 26th to March 6th made plaintiff a guest of defendant so as to render him liable as innkeeper for the safe-keeping of the bag of gold. This instruction the court refused to give, but instructed the jury to the contrary, provided they should find that the delivery of the gold was a distinct transaction, disconnected in consideration and in fact from the delivery and keeping of the horse, but that the keeping of the horse and plaintiff's leaving him there was evidence tending to show that he had not intended to sever his connection with the house as guest. Plaintiff now excepts to this charge and the refusal to charge.

E. Edgerton, for the plaintiff.

D. Roberts, for the defendant.

By Court, **BENNETT, J.** The principal question raised on this bill of exceptions is, Was the money in the custody of the defendant as innkeeper at the time of its loss? We are to take it for granted that the jury have found that the plaintiff had intentionally determined his own stay at the defendant's inn immediately after the money was left with him, and before its loss,

not intending again to return to the inn as a guest, and that the delivery of the gold to the defendant was a distinct transaction, disconnected in consideration, and in fact, from the delivery and keeping of the horse.

It is claimed by the plaintiff's counsel that the continuing liability of the defendant as an innkeeper for the horse, harness, etc., rendered him liable as innkeeper for the bag of gold, notwithstanding its delivery was a distinct transaction, and the determination of the plaintiff not to return again to the house personally as a guest. We apprehend that no one will question that, under the circumstances of this case, the defendant continued responsible as an innkeeper for the horse. The horse was to be fed, and from this the innkeeper had his profit; and it is not material in this action to inquire whether the innkeeper continued also liable, as such, for the other property left with him at the same time; but we apprehend, as to the bag of gold, according to the finding of the jury, the relation of landlord and guest did not exist.

The leaving of the bag of gold in the custody of the defendant had no connection with the original relation of landlord and guest between the parties; and when the money was lost, the plaintiff had ceased to be personally the guest of the defendant; and indeed, we are to understand from the case that when the plaintiff handed the gold to the defendant he had made up his mind to leave the defendant's inn, not to return again to it as a guest, and that he did immediately thereafter leave, with the intention not again to return; and in no proper sense could the plaintiff be said to be the personal guest of the defendant at the time of the loss; and it would be going too far to hold that the leaving of the horse at the inn, under the circumstances of the case, made the plaintiff constructively a guest in relation to the bag of gold. It is well settled that if a person leave at an inn property from which the innkeeper can derive no gain from its keeping, that is, dead property, as it is termed, and goes away himself, and it is stolen in his absence, he shall have no action against his host as innkeeper, for the reason that he was not a guest at the time: See *York v. Grindstone*, 1 Salk. 388; *Selman v. King*, Cro. Jac. 183; 3 Bac. Abr., Wilson's ed., 665, tit. Innkeeper; *Grinnell v. Cook*, 3 Hill, 485 [38 Am. Dec. 663]; *McDonald v. Edgerton*, 5 Barb. 560. In such a case, all that could be claimed would be to charge him as a bailee. It is clear that if the leaving of the bag of gold with the defendant had been the beginning of the transaction, the defendant could not

be charged for it as innkeeper, and we do not see that in principle the case can differ. The bag of gold was dead property, giving to the defendant no right to make gain from its keep as innkeeper; and it had no connection with the cessation or continuance of the original relation of host and guest; and to say that the leaving of the horse at the inn is to have an effect upon the capacity in which the defendant can be charged for the safe-keeping of the money is to say what we cannot well understand.

Judgment affirmed.

WHO ARE GUESTS.—This question has been discussed at length in note to *Clute v. Wiggins*, 7 Am. Dec. 451; see also *Towson v. Havre de Grace Bank*, 14 Id. 254, and note; *Mason v. Thompson*, 20 Id. 471; *Grinnell v. Cook*, 38 Id. 663; *McDaniels v. Robinson*, 62 Id. 574, and note.

INNKEEPER IS ONLY ANSWERABLE FOR MONEY OR OTHER PROPERTY LOST at his inn, where the party losing it was a guest at the time of the loss: *Towson v. Havre de Grace Bank*, 14 Am. Dec. 254.

ONE WHO COMMITS HORSE TO INNKEEPER TO BE FED is a guest, although he may not board or lodge there. And payment for the keeping of the horse renders the innkeeper liable for the theft of the harness: *Mason v. Thompson*, 20 Am. Dec. 471; *McDaniels v. Robinson*, 62 Id. 574; see *Reed v. Amidon*, 41 Id. 15.

SNOW v. PARSONS.

[28 VERMONT, 459.]

WHAT IS REASONABLE USE OF WATER IN STREAM has been in some cases so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law.

REASONABLENESS OF USE OF STREAM, WHEN IT IS NOT SETTLED BY CUSTOM, and is in its nature doubtful, is a question of fact to be determined by the tribunal trying the facts.

RIPARIAN PROPRIETOR MUST BE ALLOWED TO USE STREAM in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below; consequently, in an action against a tanner for discharging waste bark into a stream, to plaintiff's injury, evidence which tends to show that tanneries cannot be operated to any useful purpose without thus disposing of their waste bark is admissible and very material.

IN DETERMINING WHAT WOULD BE REASONABLE USE OF STREAM BY TANNER, EVIDENCE THAT IT HAD BEEN UNIVERSAL CUSTOM and practice to discharge spent bark of tanneries into streams on which they were situated, ever since the country was first settled, is admissible, and if proved would have almost the force of a law.

CASE against the defendants for obstruction of plaintiff's water-wheel by tan-bark discharged from their tanneries situated on the stream above plaintiff's wheel. The action was

referred to a referee, who reported the facts. In this report he described the relative positions upon the stream of plaintiff's mill and defendants' tannery, and the dates at which they became the owners thereof respectively, all of which it is unnecessary to state here. He then described the nature of the damage which plaintiff had sustained. At the hearing before the referee, defendants offered to prove that ever since the country had first been settled it had been the uniform custom and practice in all the counties of the state to discharge the spent bark of tanneries into the streams upon which they were built, and that witnesses had never heard a dam-owner lower down upon the stream object to their so doing until now. They also offered to show that if this privilege was generally withheld tanneries could not be conducted at any profit, and that the result would be the exclusion of that industry from the state. He also offered to show by his witnesses that to the best of their knowledge this custom prevails uniformly in all the New England states. This evidence was all refused, and upon the facts as found and reported the court found for the plaintiff, to all of which defendants took exceptions.

J. D. Bradley, and Butler and Knowlton, for the defendants.

Shafter and Davenport, for the plaintiff.

By Court, REDFIELD, C. J. The important, and as I think the only, question in this case is, whether it is proper for extensive tanneries upon moderate-sized streams to expend their refuse, or spent bark, into the stream. In regard to many uses of the water in streams, it has been so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some *débris* or waste deposit in such streams, there would seem to be no question. The uniform practice, the convenience, and in some instances the indispensable necessity, would seem sufficiently to decide such cases. Among these may be named the infusion of soap dyes, and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of sawdust, to some extent, is nearly indispensable in the running of saw-mills, and most other machinery used in the manufacture of wood, and propelled by water power.

The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian

proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit which might be of no account in some streams might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously; and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort and health even as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water must submit to small inconveniences to afford a disproportionate advantage to others.

It seems to us that this question of the reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts. In the present case, it does not seem to have been treated in that light, unless we regard the judgment of the county court in favor of the plaintiff as determining it. And as much of the testimony rejected might have had an important bearing upon this question, and no notice is taken of this point either in the report or the judgment, we must suppose it was not the purpose of the county court to decide the case upon that ground. Indeed, the report furnished no adequate materials for such a determination. That portion of the defendants' offer which tended to show that tanneries could not be operated to any useful purpose without thus disposing of their waste bark was almost a cardinal point in determining the main question, and if shown to the extent offered, might justify the court in finally requiring the proprietors below to submit to some inconvenience that those above might not be deprived of all benefit of the stream for this kind of manufacture. And the reasonableness of plaintiff submitting to this inconvenience must depend upon its extent, and the comparative benefit to the defendants, to be judged of by the triers of the facts.

This must be determined upon general principles applicable to the entire business of tanning, and the importance of dis-

HOWARD v. GOULD.

[28 VERMONT, 523.]

IN SALE OF HORSE, IF REPRESENTATIONS AS TO HIS SOUNDNESS ARE FALSE, ARE NOT BELIEVED TO BE TRUE when made, and are made to induce a purchase, and a damage results from them, they are actionable; nor is it necessary, to constitute the fraud, that a material fact should be directly misrepresented intentionally; if a false impression is produced by words or acts in order to mislead, it is sufficient.

DEFENDANT HAVING HORSE WHICH HAD GLANDERS, AND BEING SO INFORMED, AND PROBABLY BELIEVING SO, offering to trade him, being asked if his horse had the glanders, replying that some said he had the distemper, but that plaintiff could examine him, is liable to an action for the false representations, as his answer amounted to an affirmation that he did not believe the horse had the glanders; and having undertaken to answer the questions put to him, he was bound to make a full disclosure.

CASE for deceit in the exchange of a horse. The referee to whom the matter was referred reported substantially as follows: Defendant purchased the horse from a man named Bryant. At this time the horse was diseased, and upon defendant's asking what was the matter with him, Bryant answered that he had the horse-distemper, and that some said he had the glanders. A short time after making his purchase, defendant took his horse to Atherton, an expert on diseases of the horse, and he told him he thought that the horse had the glanders; that if he had the distemper, it would probably end in the glanders, and told defendant to remove him from his premises. A short time after this, defendant met plaintiff, and they commenced to talk about trading horses. Defendant told plaintiff that his horse was sick, and that he would like to get one that was fit to work. Plaintiff asked him what was the matter with his horse, and he answered that he had the horse-distemper of the worst kind, he supposed, but that defendant might examine him. Plaintiff then asked him if the horse did not have the glanders, and defendant answered that he supposed that he had the distemper. Plaintiff's son then came up, and plaintiff referred the trade to him. The latter thereupon had about the same conversation with defendant that his father had had, and they completed the exchange. The referee found that the horse in fact had the glanders, but that it did not appear that the defendant had any other knowledge of what his disease was than what he had derived from Bryant and Atherton, as above stated. Upon the referee's report, the court gave judgment for defendant, and plaintiff excepted.

S. Fullam, for the plaintiff.

J. F. Deane, for the defendant.

By Court, BENNETT, J. It is a common principle that a false affirmation, not believed to be true, or a fraudulent concealment of a material fact, accompanied with damage, is actionable. If the affirmation is untrue in point of fact, and not believed to be true by the party making it, and is made for a fraudulent purpose, it is both a moral and a legal fraud: *Taylor v. Ashton*, 11 Mee. & W. 415; and in *Polhill v. Walker*, 3 Barn. & Adol. 114, the court go the length of holding that if one makes a representation which he does not know or believe to be true, and it turns out to be false, and another person, acting upon the faith of it, is injured, he has his remedy against the person making the false affirmation. A false affirmation, not believed to be true, is fraudulent; and the question of the liability of the person making it must depend upon the sincerity of his belief as to its truth, which will of course be for the jury to pass upon. In the case of *Munroe v. Pritchett*, 16 Ala. 785 [50 Am. Dec. 203], the court go the length of holding that if the representations are made recklessly, the party not knowing them to be true, and for the purpose of inducing the other party to make a purchase, they are actionable if accompanied with damage. But we are not disposed, in this case, to lay the rule down in this language; but we think it safe to hold that if the representations are false, and not believed to be true when made, and are made to induce a purchase, and a damage ensues by means of them, they are fraudulent and actionable; and to constitute a fraud, it is not necessary that a material fact should be directly misrepresented intentionally; but if a false impression is produced by words or acts, in order to mislead and obtain an undue advantage, it should be regarded as a case of manifest fraud.

When the defendant was inquired of if his horse had not got the glanders, and he replied that he supposed the disease was the horse-distemper, this was in effect an affirmation that he did not believe the horse had the glanders, upon the principle that the affirmation of the one is the exclusion of the other.

From the facts found by the referee, and all the circumstances attending the case, I should have found no difficulty in inferring a belief in the mind of the defendant that his horse had the glanders. But this was a question of fact. The referee does, however, find that, under the circumstances, the defendant was guilty of fraud by an improper suppression of facts. He bought

the horse a very short time before the trade with the plaintiff for a diseased horse; and was told by the person of whom he bought that some said he had the horse-distemper, and some said he had the glanders, though he did not pretend to know himself. But Atherton, a man skilled in the diseases of horses, upon an examination of the horse, informed the defendant he believed the disease was the glanders.

When the defendant undertook to answer the inquiries put to to him, he was bound to make a full disclosure. It is quite evident that this is a case, where, to say the least, there was a fraudulent suppression of material facts, which, if they had been disclosed, would probably have prevented the trade. Though the plaintiff knew the horse was diseased, and had the means of examining him, yet he had not the same means of knowing the character of the disease as the defendant had; and in this respect they cannot be said to stand upon an equality. As this case went to a referee, no question can arise in regard to the plaintiff's right to recover, upon his present declaration, for a fraudulent suppression of facts.

The result must be, the judgment of the county court is reversed, and judgment on the report for the plaintiff.

ANY LANGUAGE SHOWING INTENTION to warrant is sufficient; the word "warrant" is not necessary: *Kinley v. Fitzpatrick*, 34 Am. Dec. 108; *Towell v. Gatewood*, 33 Id. 437.

WHAT CONSTITUTES BREACH OF WARRANTY OF SOUNDNESS OF ANIMALS: See note to *Roberts v. Jenkins*, 53 Am. Dec. 173.

WHEN VENDOR UNDERTAKES TO ANSWER WITH REGARD TO ARTICLE which he offers for sale, he must answer fully, and must disclose all he knows upon the subject: *Graham v. Stiles*, 38 Vt. 578; *Mallory v. Leach*, 35 Id. 156.

ESDON v. COLBURN.

[28 VERMONT, 631.]

UNDER LEASE OF FARM UPON SHARES, WHICH PROVIDES THAT STOCK AND PRODUCE IS TO BE AT CONTROL of the lessor until sold, he can hold them against the creditors of the lessee. The lessee has no interest in the crops while growing upon the land, nor after they are harvested, and they are not subject to attachment for his debts.

WHERE LEASE OF FARM UPON SHARES PROVIDES THAT STOCK AND PRODUCE OF FARM IS TO BE AT CONTROL of the lessor until sold, and the lessor and lessee have a settlement, whereby the lessee, for a consideration, relinquishes his claim to his share of the proceeds of a sale of the crops, there is no necessity for a delivery or change of possession to vest the title to the entire crop in the lessor.

TROVER for five tons of hay. Defendant pleaded the general issue. At the trial, it appeared that William Warden leased to Chester Johnson a farm. Johnson was to pay as rent one half of the increase and produce of the farm. The lease provided that the stock and produce was to be at the control of the lessor Warden until sold. The hay which is the subject of this suit was cut upon the leased premises in the summer of 1853, and placed in a barn thereupon. Warden and Johnson made a settlement of their business accounts November 24, 1853, by the terms of which the hay became the property of the former. Warden then advertised a sale of property at auction December 7, 1853. Among other property advertised to be sold was the hay in question. On the morning of this latter date Clark & Co., creditors of Johnson, attached the hay. Later in the day the hay was sold at auction to plaintiff, Clark & Co. being present and forbidding the sale. In January, 1854, Clark & Co. obtained a judgment against Johnson, upon which they sued out execution. This execution was levied upon the hay in question, and it was sold to defendant in satisfaction thereof. Defendant thereupon removed and used the hay. Upon these facts the court directed the jury to find for the defendant, and plaintiff excepted.

A. M. Dickey and C. B. Leslie, for the plaintiff.

J. Potts, for the defendant.

By Court, ISHAM, J. The hay in question was grown during the year 1853, upon the land occupied by Johnson as lessee, and was deposited in the barn standing upon the leased premises. The plaintiff claims the property under a purchase of it from Warden, the lessor, on the seventh of December in that year. The defendant claims it under the sale of the property on execution, in favor of Clark & Co., against Johnson. The attachment of Clark & Co. was made on the morning of the day the property was sold to the plaintiff by Warden, and of which the plaintiff had notice at the time of his purchase. The principal question arises, whether the hay was the property of Warden or of Johnson at the time the attachment was made.

As a general rule, a tenant is regarded as a joint owner of the crops and proceeds of the farm occupied by him, under a lease providing that they are to be equally divided between himself and his landlord. The tenant, in such case, has an interest in the crops which may be taken on execution and sold for the payment of his debts. That rule would give Johnson a right to

a portion of this hay, unless his right to it is otherwise affected by some express stipulation of the parties in the lease. In the case of *Smith v. Atkins*, 18 Vt. 461, it was held that a stipulation in a lease that the crops and produce of the land, raised during the term, shall be the property of the lessor, is a legal and valid provision, and that it will enable the lessor to hold the crops against the creditors of the lessee. The general doctrine was held that a lessor, under such a provision in a lease, may have a general property in the products of the land, though they are thereafter to be grown. The lessor may be accountable to the lessee for the value of one half of the produce, but the lessee has no legal title or interest in the crops; he does not stand as a joint owner with the lessor. If such an agreement is valid when made to secure the payment of rent, it should be regarded as equally valid when it is made to secure the performance of other covenants in the lease. In this case, the lease provides that Johnson is to have one half of the increase and produce arising from the use of the farm and property leased, and that the stock and produce is to be at the control of said Warden until sold. This provision, though not so full in its language as in the case of *Smith v. Atkins*, *supra*, is free from any reasonable doubt as to the intention of the parties. Their object manifestly was to cut off the joint ownership of the crops and produce of the land, and vest the entire control and ownership over it in Warden. That provision could have been inserted for no object but to secure the performance of the other covenants in the lease by the lessee, and for the purpose of protecting the property from any improvident use or sale of it, and also to prevent its being taken from the premises by the creditors of the lessee before the claims of the lessor were satisfied. In that view of the case, Johnson had no interest in the hay or other crops while growing upon the land, nor after they were harvested. His right, under the lease, was only to his share of the money after it had been sold. Johnson had, therefore, no attachable interest in the hay; no lien was acquired upon it by the attachment of Clark & Co., and no title passed to the defendant by its sale on their execution. That doctrine was the principal ground on which the case of *Smith v. Atkins*, *supra*, was decided, and we think it must determine the result of this case.

The settlement between Warden and Johnson, on the twenty-fourth of November, and before the attachment of this hay by Clark & Co., is satisfactory, not only as to the right of the plaintiff to this property, but also in showing what was the under-

standing of the parties in relation to it. There is no pretense but that the settlement was just as between Warden and Johnson; nor have any suggestions been made that the arrangement was effected to defraud the creditors of Johnson. The substance and affect of that arrangement was an appropriation of a portion of the products of the land in satisfaction of the claim which Johnson would have had for the money, on the sale of the property by Warden; in other words, Johnson took a certain quantity of the produce of the land, instead of waiting for the money on a sale of the property. Johnson had no interest in the hay, nor in the money that should be realized on its sale, after the twenty-fourth of November. There was no need, therefore, of a removal of the property, or any change in its possession, as Johnson never owned the hay, nor did Warden stand as a purchaser of it. The title of Warden to the hay was perfect under the lease, and all claim on the part of Johnson to any of the proceeds arising from its sale was cut off by the settlement or arrangement made between them on the twenty-fourth of November in that year. The plaintiff, we think, acquired a valid title to this hay under the sale of it to him by Warden, and is entitled to recover its value from the defendant for taking and converting it to his own use.

The judgment must be reversed and the case remanded.

WHERE LESSOR AND LESSEE TO CROPPING CONTRACT agree that the property in the crop shall remain in the lessor until a division or sale, the property will so remain: See note to *Putnam v. Wine*, 37 Am. Dec. 321. In this note the nature of a cropping contract is discussed at length. In the absence of an agreement such as the above, some cases hold the property in the crop to be in the lessor, and others, that it is in the lessee. The cases upon both sides are collected in this note. See also that the property of a crop raised upon the shares is in the lessee until division: *Symonds v. Hall*, 59 Id. 53; that it is in the landlord, see *Brazier v. Ansley*, 51 Id. 408, and note to this case.

THE PRINCIPAL CASE IS CITED IN *Cooper v. Cole*, 38 Vt. 191, where the court say: "It has been repeatedly decided in this state that the lessor of land may stipulate in the lease that the crops grown on the premises by the lessee shall remain the property of the lessor until the rent shall be paid, and that such a provision is valid, not only between the parties, but as to third persons also."

BROCK v. EASTMAN.

[28 VERMONT, 658.]

PARTITION CANNOT BE EMPLOYED AS MEANS OF SETTLING CONFLICTING TITLES.

IF ONE JOINT OWNER OUSTS HIS CO-TENANT, LATTER MAY REGARD FORMER'S possession as his own and maintain partition, but if the ouster amounts

to an effectual disseisin, they no longer hold the estate together, and partition cannot be maintained.

PARTITION.—ONE WHO CAUSES EXECUTION TO BE LEVIED UPON UNDIVIDED PORTION of a piece of property of which the owner is in the possession, claiming adversely to any title under the levy, cannot maintain partition, as, if the levy was valid, it could only give a right of entry, which is not sufficient to maintain a petition for partition.

PETITION for partition. Defendant, among other pleas, denied that petitioner was tenant in common with him. It is unnecessary to state the facts of this case more particularly than that petitioner obtained a judgment against defendant, upon which execution was issued, which was levied upon the premises herein sought to be partitioned. Defendant has always remained in the sole possession of the premises, claiming adversely to the petitioner's title under the levy. The petitioner's petition was dismissed by the court below, and he excepted.

R. McK. Ormsby, for the petitioner.

C. B. Leslie, for the defendant.

By Court, BENNETT, J. We think there is one point in the case which is fatal to the plaintiff's petition, and none other need be considered. The first plea puts in issue the seisin of the defendant as tenant in common with the petitioner; and the exceptions find that the defendant was the sole owner of the premises at the time he executed his mortgage to the Tuckers, in 1850, and that he has ever since been in the sole possession of the premises, claiming adversely to the petitioner under his levy of execution. The object of the proceeding in a petition for partition is to turn an estate that is possessed in common into an estate in severalty, and not to furnish a mode of settling conflicting titles. It is a general rule that a petition for partition cannot be sustained on a mere right of entry. But there is a distinction between a mere possession of the plaintiff's share by a third person or by the defendant and a legal disseisin. In cases where a privity has existed between the parties, as in the case of joint tenants or tenants in common, and one tenant ousts his co-tenant, by taking the whole profits to himself, denying his co-tenant's right, such a possession may be treated as a disseisin, for the purpose of bringing ejectment; or he may elect to treat such possession of his co-tenant as his possession, and in that event may maintain a petition for partition: See *Clapp v. Bromagham*, 9 Cow. 566; *Barnard v. Pope*, 14 Mass. 434 [7 Am. Dec. 225]; *Hawley v. Soper*, 18 Vt. 320. But it would seem from the authorities, if

the party in such a case is effectually disseised, they no longer hold the estate together, and he is barred of his remedy for partition: Co. Lit. 167; 5 Com. Dig. 166; 1 Swift's Dig. 103. But the case now before us is one where the parties never held the estate together. There was no privity between them. The defendant held the whole estate from the time of the commencement of the plaintiff's claim adverse to him.

If the plaintiff's levy was valid, it could only give him a right of entry, and would not enable him to sustain this proceeding. Judgment affirmed.

QUESTION OF WHO CAN COMPEL PARTITION is discussed at length in the note to *Nichols v. Nichols*, ante, p. 699.

ABBOTT v. COBURN.

[28 VERMONT, 663.]

JURISDICTION TO GRANT LETTERS OF ADMINISTRATION BY PROBATE COURT CANNOT BE COLLATERALLY ATTACKED.

DISCHARGE BY ADMINISTRATOR APPOINTED IN VERMONT of debtors who owed his intestate at the place of his death in another state, or of one who held money belonging to the intestate at the place of his domicile beyond this state, does not discharge them from their debts, or relieve them from liability to a suit by an administrator at either of said places, to recover the amount of said debts.

ACCORDING TO LAW OF VERMONT, NO ONE BUT ADMINISTRATOR APPOINTED IN STATE in which intestate's debtors resided at the time of his death can collect such debts, or release them, or properly administer them. It is doubtful, in this state, if remitting such debts to the administrator of the place of the domicile of deceased would discharge them.

ADMINISTRATOR APPOINTED IN VERMONT UPON ESTATE OF PERSON WHO DID NOT RESIDE in this state cannot maintain an action to collect a debt due to said deceased, or money belonging to his estate in the hands of a person who does not reside in said state. The same can only be collected by an administrator appointed at the place of residence of the debtor of the intestate.

THIS was an action of *assumpsit*, in which the parties agreed upon the facts, which were substantially as follows: Lester Abbott, formerly a resident of Vermont, went to Massachusetts in 1845, where he resided until 1848, when he went to California. He left his wife and child in Massachusetts. Lester Abbott died in California in 1850, leaving a little property, which was taken care of by John Hutchinson. He collected it, converted it into money, paid the debts of deceased, and sent the surplus, the amount in controversy in this suit, to Caroline Abbott, deceased's

widow, by Henry Cooley, who was returning from California to Vermont. He paid the money to Caroline in 1851; she gave him a receipt therefor, and she then loaned the same with other of her money to Benjamin F. Abbott, taking his note therefor. To collect the same she afterwards maintained a suit against him, and she recovered it September 24, 1852. On the ninth day of the same month Benjamin F. Abbott was appointed administrator of the estate of Lester Abbott. The remaining facts it is unnecessary to state. Judgment for plaintiff. Exceptions by defendants.

W. Hebard, for the defendants.

P. Perrin and J. P. Kidder, for the plaintiff.

By Court, REDFIELD, C. J. In regard to the jurisdiction of the probate court to grant administration in this state, we think the case comes within the general principle so often announced, that it cannot be attacked collaterally, but the question must be raised by some proceeding before that court in the first instance, which could only be revised in this court by appeal to the county court, and exceptions or writ of error to this court. The consideration that the facts are agreed upon in this case can make no difference. The proceeding is not in the proper court for the testimony to operate otherwise than collaterally.

But we do not see but the same question virtually arises in regard to the plaintiff's right to recover this money of the widow of the deceased, *i. e.*, if this is all the estate there is in this state.

The proper place for the principal administration in this case is undoubtedly not here. It is either in California or in Massachusetts, in one of which places the intestate had his residence at the time of his decease. This money should have been administered either in one or the other of those states. And the fact that no administration has yet been taken in either of those states will make no difference, as that may be done hereafter. We should probably be bound to decide this question the same as if an administration existed in Massachusetts, and a suit were there pending for this same money.

It is well settled that if the debtor resided in this state at the time the money was received, as she did in Massachusetts, that any discharge of a foreign administrator could not affect the right of the administrator in this state to recover the debt: *Vaughn v. Barret*, 5 Vt. 333 [36 Am. Dec. 306], and cases there cited.

In regard to the principal administration, it seems to be well

enough settled in some states, although the rule may not be settled here, that assets brought from a foreign jurisdiction into the one of the domicile of the intestate are to be there administered. These funds, then, did properly belong to the jurisdiction of California or Massachusetts, and should have been there remitted and administered.

The intestate had his residence in Massachusetts up to December, 1848, and left his wife and child there when he went to California; and there is nothing in the case to show that he ever changed his residence to any other place. It is obvious he had no residence in Vermont at the time of his decease. His wife could not change his residence here in his absence, and without his consent, and she returned to Massachusetts in the spring of 1850, "where she has ever since resided," as the case states; so that Massachusetts is probably to be regarded as the place of the domicile of the intestate at the time of his decease, and was clearly the place of residence of this debtor at the time she received the money.

The funds, then, which were collected in California should have been remitted to Massachusetts, and there administered, or else retained in California; and as the widow then resided in Massachusetts, we think paying them to her, whether the act was done in that state or in this, is to be regarded as remitting them to the place of the domicile of the deceased, and that they are not liable to be administered in this state, or in any other place out of Massachusetts, unless in California.

It is well settled that choses in action belonging to the deceased are, for this purpose, to be regarded as having their *situs* in the place of the residence of the debtors. That was the rule of the common law as to simple contract debts: Carth. 373; *Hilliard v. Cox*, Salk. 37; S. C., *Ld. Raym.* 562. And any discharge in regard to these funds, out of California, where they were at the decease, unless in the place of the domicile of the deceased at his death, will be altogether unavailing. It is settled in this state by the cases referred to, beyond all question, that the release of the plaintiff for these funds would be no discharge, either to Hutchinson, who collected them, or to Cooley, who brought them out of California, or to the defendants, who received them; and by parity of reasoning, as we think, a judgment in his favor would have no greater effect. That could only extend to the merger of his rights. And if he had no right to the funds, the judgment could not affect the rights of an administrator in Massachusetts, where the debtor

resides. Unless, then, the funds have been remitted to the place of the domicile of the deceased, which Vermont clearly is not, all who have had any agency in collecting or transmitting them are liable to the suit of an administrator, either in Massachusetts or California, according to the case of *Welchman v. Sturgis*, 13 Ad. & El., N. S., 552, 66 Eng. Com. L.; and *Bullock's Adm'r v. Rogers*, 16 Vt. 294. And any judgment we might here give would afford no protection against such suit; for if the defendants are liable here because the money was received here from Cooley, which does not appear, but may be true, then Cooley is liable here also for paying it over, as was held in the English case last cited, and he is equally liable in every state through which he carried the money. And if the defendants are liable here, so are they equally in New Hampshire, if they carried the money from this state to Massachusetts.

But according to the case of *Welchman v. Sturgis*, *supra*, Hutchinson is liable as for a tort, as executor *de son tort*, for collecting these funds; and it is only by waiving the tort that any action for the money lies. But it is questionable whether that rule will apply indifferently to all persons to whom that money came, as money has no ear-mark, and is incapable of being identified. For Hutchinson's paying over the money did not release his liability. He is still liable for all the money he collected, and cannot deduct even the debts which he paid for the estate. And the persons of whom he collected the money were not discharged of their obligation to the estate by paying to him unless he remitted the money to the rightful administrator in the place of the domicile. And if Cooley were ever liable, his paying over the money to the widow will not release him until she remits the money to the rightful administrator in the place of domicile. That, then, is the duty of Hutchinson, Cooley, and the defendant Caroline.

A debt, by the decease of the creditor, becomes *bona notabilia*, or assets in the place of residence of the debtor; and according to our decisions, no one but an administrator in that state can collect it, or release it, or properly administer it. It is no longer transitory, as before the decease of the creditor, but becomes local, and is confined to the probate jurisdiction of the debtor's residence, unless it be remitted to the administrator of the place of the domicile of the deceased, as is held in some states; but that is no discharge here, I think. That is the very point decided in *Bullock's Adm'r v. Rogers*, 16 Vt. 294. That action, it is expressly decided there, would not lie for the debt

because the debtor resided in New York, but it was sustained for the instrument which did belong to the administrator in Vermont, that being the place of domicile. We think, therefore, that this action cannot be maintained, upon the facts stated, in the courts of this state.

We are liable to some confusion of perception upon the subject of disposing of the effects of deceased persons by attempting to keep up, in our minds, the same views and analogies which apply to the same species of property while all parties concerned are still living; and also by apprehending money as capable of identification.

The truth undoubtedly is, that, as to choses in action, after the decease of one of the parties, they are incapable of any change until the intervention of a personal representative of such deceased party, appointed by the proper municipal authorities of the place of the domicile of the debtor. Such choses in action can never be transferred, paid, or in any other manner affected, while one of the parties is legally extinct. Upon the appointment of the representative, the law throws the rights of the deceased party upon him just as they existed at the decease, except that any interference with the concerns of the deceased is regarded as a tort, and an action accrues from the perpetration of the wrong, by relation, which the representative may take up and prosecute.

Money, too, is incapable of indentification. Hutchinson, by attempting to collect debts due Lester Abbott, did not in fact obtain any money of the deceased. It was the money of the persons of whom he obtained it, and when paid to him, it became his own. The debtors of the deceased did not by the transaction pay their debt. They, at most, acquired the obligation of Hutchinson to see it paid in a legal manner, in consideration of having received the amount of money. And the law, regarding this as a tort, will allow the representative of the deceased to waive the tort and sue for the money by means of a legal fiction. So, too, all persons consenting to this tort, and receiving the avails of it, with the same undertaking to see it paid to the legal representative of the deceased, may possibly be liable for the money at the suit of the representative by means of a legal fiction. But in all this the law keeps up no idea of the identity of the money. Nor is it of the least importance whether it be the identical money or not. If that idea were to affect the case, the present plaintiff might himself be said to have received the money of the estate, and therefore be bound to administer it.

But nothing of that is found; for he received the money of the widow, and clearly did not implicate himself in the original tort by which it was obtained, inasmuch as he was to pay it back to her. The money all along belongs to the several persons who pay and receive it. But by the transaction they may or may not be regarded as consenting to the original tort and adopting it. But if they do, the consent to the original wrong is not itself a new and independent tort, to be answered for in the place where the transaction occurred.

According to the decisions in this state, I think the transmitting of this money to Massachusetts, and having it there administered, that being the place of the domicile of the deceased, would afford no protection against the claim of an administrator appointed in California who should sue either Hutchinson or the original debtors; or at least, that is questionable upon our decisions. But Judge Story lays down the rule, in his Conflict of Laws, that remitting the funds to the administrator in the place of domicile will be a discharge, and upon principle and for convenience, I think it should be so. But he refers to no cases where it has been so held in England, and I doubt if any such principle has ever been there recognized. I think that is the rule of some of the American states, but no such rule could be applied to a merely auxiliary administration, which the plaintiff's clearly is. It seems to us, therefore, impossible to find any satisfactory ground upon which the plaintiff's right to this money can be vindicated. There may have been actions maintained in this state where this same question might have been raised and was not. Courts do not ordinarily feel bound to go beyond the questions raised in argument, and when that is attempted, it is often at the hazard of making a wrong decision. And where the objection is merely technical, it would never be raised by the court if not pointed out, or certainly not ordinarily.

Judgment reversed, and judgment for the defendant.

JUDGMENT OF PROBATE COURT CANNOT BE QUESTIONED COLLATERALLY ON account of any error or defect in it: *Lynch v. Baxter*, 51 Am. Dec. 735; *Tucker v. Harris*, 58 Id. 488; *Wyman v. Campbell*, 31 Id. 677; *Palmer v. Oakley*, 47 Id. 41; *Bailey v. Dillworth*, 48 Id. 760; *Merrill v. Harris*, 57 Id. 359; see also *Doolittle v. Holton*, *post*, p. 745, and cases in note.

ADMINISTRATION, WHERE GRANTED, AND BY WHAT LAW GOVERNED: See *McCollum v. Smith*, 33 Am. Dec. 147; *Gravillon v. Richards*, Id. 563; *Goodall v. Marshall*, 35 Id. 472; *Lawrence v. Kitteridge*, 56 Id. 385; *Packwood's Succession*, 43 Id. 230; *Vroom v. Van Horst*, 42 Id. 94; *Atchison v. Lindsey*, 43 Id. 153; *Bell v. Scammon*, 41 Id. 706; *Fletcher v. Sanders*, 32 Id. 96, and notes to these cases.

SLEEPER v. POLLARD.

[28 VERMONT, 709.]

SALE, DELIVERY, CHANGE OF POSSESSION.—A party had a quantity of hay in a barn upon a farm which he carried on by his hired man. He sold a quantity of it to another person, telling him he could leave it in the barn until he could haul it away. The latter, in the presence of the former, thereupon requested the hired man to take charge of the hay for him, and he said he would do so. The remaining hay in the barn belonged to the seller. *Held*, that there was not such a delivery and change of possession as the law requires to protect the property from attachment by the seller's creditors.

THIS was an action of trespass for a quantity of hay. It was attached as the property of William Woodman. The hay in question was cut by Woodman on a farm which he carried on by his hired man, named Kelley. After it was cut it was put in a barn upon the farm with other hay of the year previous. August 17, 1854, Woodman sold this hay to the defendant Pollard, and gave him a bill of sale for it, at the same time telling him that he might leave it in the barn until he could draw it away. Thereupon the defendant, in Woodman's presence, asked Kelley if he would take care of the hay for him, and Kelley said that he would. Pollard hauled away part of the hay before the attachment, and part after. Verdict for plaintiff. Exception by defendant.

Peck and Colby, for the defendant.

A. M. Dickey, for the plaintiff.

By Court, REDFIELD, C. J. It does not appear to us that there was any such change of possession in the present case as the law requires, to protect the property from attachment.

It was in the barn of the debtor, or one in his possession, or that of his hired man, which is his possession in law; and it remained there until the attachment, nothing being done to indicate a change of ownership, except to request the hired man to take care of it for the purchaser, he still continuing in the employ of the debtor. This certainly could not be regarded as a visible, substantial change of possession.

The case seems to us, in principle, and in many of its leading facts, very similar to that of *Beattie v. Robin*, 2 Vt. 181, and *Judd v. Langdon*, 5 Id. 231.

Judgment affirmed.

SALE OF PERSONAL PROPERTY, unless it is followed and accompanied by the possession of the purchaser, is void as to the creditors of the vendor. Where the parties to an absolute bill of sale of personal property reside together, an actual, visible change of possession, such as might be understood and known in the neighborhood, is necessary to vest title in the vendee: *Jarvis v. Davis*, 61 Am. Dec. 166, and cases in notes.

THE PRINCIPAL CASE IS CITED AND FOLLOWED in *Flannagan v. Wood*, 33 Vt. 332. In this case the court say: "The possession of a mere servant or hired man is but the possession of the master, and does not, like the possession of other third persons, put the creditor on inquiry."

THOMPSON v. KILBORNE.

[28 VERMONT, 750.]

PROFESSIONAL COMMUNICATIONS.—WHERE PERSON HAS GENERAL CONVERSATION WITH ATTORNEY about a question of law, where no retainer is paid, and there is nothing to show that the person sought the advice with any view to regulate his future conduct in regard to a pending or expected litigation, his communications are not privileged, as being made between counsel and client.

PRACTICE OF GIVING ADVICE UPON LEGAL SUBJECTS WITHOUT STUDY and examination, and without corresponding pay and a distinct retainer, is a vicious one, which this court strongly disapprove of.

PLEADING—EVIDENCE.—In an action for refusing to furnish the necessary kiln and hop-house for preparing hops for market, under a contract to prepare a suitable and convenient kiln and dry-house, to be prepared and ready for use when the same should be required, evidence that the contractee directed the contractor not to build them, but to use the contractor's kiln and dry-house for the purpose, that the contractor did so, and paid for the use of the same, and that the contractee made no objections, but fully assented to the arrangement, is admissible under a plea by the contractor that he did prepare a suitable kiln and dry-house, ready for use when required; also that he did prepare the same according to the true intent and meaning of said contract, and to the full satisfaction of plaintiff.

COVENANT for breach of contract. Defendant in 1844 agreed to furnish five acres of land to the plaintiff for the period of nine years, to be used as a hop-yard. He also agreed to prepare the necessary kiln, dry-house, etc., to be used in the preparation of the hops for market. As breaches of this contract, plaintiff alleged the refusal of defendant to allow him to use said premises after the fall of 1847; also his refusal to prepare the necessary dry-house, kiln, etc., in the year 1846. Upon the question of his refusal to allow plaintiff to occupy the premises after the fall of 1847, defendant offered in evidence the deposition of E. D. Johnson, an attorney at law. Plaintiff objected to this

deposition, upon the ground that it related to matters communicated to Johnson while acting as his attorney. The court admitted it. It was to the following effect: "The said Thompson called upon me at my office and had considerable chat about his contract with the said Kilborne. Whether the conversation was professional or semi-professional, or neither, I am at a loss to determine, but I will state the circumstances, and leave the matter to be determined by higher authority. Thompson introduced the conversation by inquiring about his contract with Kilborne for carrying on the hop-yard. I am unable to state its exact purport, but am able to state the substance. He inquired if he could not make use of something which had occurred between him and Kilborne to avoid the effect of his contract to carry on the yard. I am unable to state whether it was something Kilborne had said or done in the matter, and am unable to say what reply I gave him; but he then said he should not carry on the yard again, and he thought the matter he stated would protect him in so doing, and he inquired of me if I did not think so." Deponent then went on to say that he understood that Thompson was endeavoring to draw from him a legal opinion, but nevertheless he answered him. He did not receive any compensation or fee, and he did not intend to charge any. He had had probably a hundred just such conversations with Thompson before. Upon the question of the defendant's refusal to build a dry-house, kiln, etc., in 1846, the evidence is sufficiently referred to in the opinion. Plaintiff claimed that this evidence was not admissible under defendant's pleas, and to the court's instruction that it was he excepted.

Cooper and Bartlett, for the plaintiff.

J. H. Prentiss, and Peck and Colby, for the defendant.

By Court, REDFIELD, C. J. 1. The first question made in the present case is whether the plaintiff's communication to Johnson was under the confidence of the relation of counsel and client. It seems to us not to be of that character. There was no retainer, and nothing to show that the plaintiff sought the advice with any view to regulate his future conduct in regard to a pending or expected litigation. And had any retainer been charged, there is every reason to believe the plaintiff could justly have resisted the claim upon the facts stated by Johnson. And had Johnson the next hour received an application for counsel, and retainer upon the other side, no one can question his being at full liberty to engage.

This anomalous relation testified to in the deposition, and which seems so much to puzzle Johnson, and which he so justly deprecates, certainly grows out of a too common facility upon the part of the profession in this state to undervalue their professional and official character as sworn officers of the highest judicial tribunal in the state. The practice of giving advice upon legal subjects without study and examination, and without corresponding pay, and a distinct retainer, is certainly a vicious one. The practice of the profession of giving street advice misleads the general opinion in regard to the value and dependence upon such advice. It would no doubt be better for the profession and their clients, both, if all professional advice in regard to the prosecution and defense of claims were given in writing, as it is in many places, and both parties are thereby put under the proper responsibility in regard to it, the one to pay for it, and the other to make it hold good, or to show at least that it was not notoriously bad. But at all events, we cannot regard a conversation of this loose and indefinite character as entitled to the protection of professional confidence.

2. In regard to the question whether the evidence on the part of the defendant tended to support the issue, we have had more doubt. But it is obvious the defendant would not only be entitled to give evidence coming fairly within the terms of the issue as closed upon the record, but also such testimony as came within the construction of the issue which the plaintiff had induced the county court to adopt.

The declaration upon this part of the case is that the defendant covenanted to "furnish the necessary kiln, dry-house, etc., for the purpose of preparing the hops for the market," and the breach assigned is that he "did not furnish a proper and suitable dry-house, kiln, etc., in which to secure the hops."

The plea to this part of the declaration is, that the defendant "did prepare" "a suitable and convenient kiln and dry-house, and that it was prepared and ready for use" when "required for the purpose" of securing the crop, etc.; 2. That he did prepare, etc., "according to the true intent and meaning of the said contract, and to the full satisfaction of the plaintiff."

The words of the contract are: "To prepare a suitable and convenient kiln or dry-house, to be prepared and ready for use when the same shall be required."

The substance of the evidence offered and received upon the trial, and which it is claimed did not come within the issue, was

that the plaintiff, in 1846, directed the defendant not to build the dry-house that season, and consented to have his own dry-house used for that purpose, and that the defendant drew the hops to the plaintiff's dry-house, and paid him for the use of it, and the plaintiff made no objection, but assented fully to this arrangement.

This seems to us to meet the issue upon both pleas. It is furnishing the dry-house as soon as required for the purposes of the contract, and also to the satisfaction of the plaintiff, either of which would be sufficient.

If this were a plea of performance generally, and the proof of a dispensation with performance, it might merit a different consideration. The plea is only of a qualified performance, or performance to the plaintiff's acceptance, and the proof is that very thing. If the dry-house had never been built, but the plaintiff had consented to have the kiln-drying done at his own kiln, and received pay for the use of his kiln, and made no objection, it would be furnishing a kiln to his satisfaction.

Judgment affirmed.

COMMUNICATIONS TO ATTORNEYS ARE PROTECTED when made with a view to professional employment, and in reference to such employment in legal proceedings pending or contemplated, or in any other legitimate professional service wherein professional advice or aid is sought: *McLelland v. Lonsfellow*, 54 Am. Dec. 599; *Coveney v. Tammahill*, 37 Id. 287. Communications to an attorney are privileged if made with reference to the subject or object of the attorney's employment, though not made in the prosecution or defense of any suit begun or contemplated: *Bank of Utica v. Mersereau*, 49 Id. 189. This is so even though the attorney has received no retainer in the matter: *Crisler v. Garland*, Id. 49. The two subsequent Vermont cases of *Coon v. Swan*, 30 Vt. 6, and *Earle v. Grout*, 46 Id. 113, are in harmony with the principal case.

DOOLITTLE v. HOLTON.

[28 VERMONT, 819.]

WHERE PROBATE COURT GRANTS ORDER OF SALE OF REAL ESTATE, AND SALE IS MADE THEREUNDER, THIS IS SUFFICIENT ground from which to presume the necessity for the sale, and the court would scarcely allow an inquiry into the foundation of the order. This is a matter within the exclusive jurisdiction of the court, and unless the order showed upon its face that it was made for some other purpose than the payment of debts, or that other means of paying them existed, the court will not allow the jurisdiction to be defeated by proof out of the record. All deficiencies in the recitals of the order will be supplied by intentment.

THAT ORDER FOR SALE OF REAL ESTATE HAD BEEN MADE WILL BE PRESUMED FROM CIRCUMSTANCES, in the absence of record proof thereof. So also will be the regularity of the proceedings of the administrator thereunder.

EJECTMENT. The lands in dispute were those set apart to the widow of Jesse Doolittle as her dower. The widow having died, the plaintiffs claim the reversion of the lands as the heirs of Jesse Doolittle. Defendant claims under a deed from Nathaniel Jenks, administrator *de bonis non* of the estate of said Jesse. The only point involved in the case was the validity of this administrator's deed, which plaintiffs claimed was void, there having been no license by the probate court authorizing it. At the trial, it appeared that an order to sell the property in question and other property was duly made to the first administrator of Doolittle; that such administrator resigned without having made the sale; that Jenks was appointed administrator *de bonis non* of the estate of Doolittle immediately after, and that about eleven months after (April 30, 1810), Jenks sold the property to the persons from whom defendant derives title. Jenks made a return of this sale to the court, and it was received and ordered to be recorded. Defendant's testimony showed that the claimants under this deed had ever since been in possession, claiming title under it. It also showed that at the period about when the sale made the probate records were very loosely kept, and that in many cases where orders of sale were actually made no record of them can now be shown. The verdict was for the defendant, and plaintiffs excepted.

G. C. Cahoon, for the plaintiffs.

By Court, REDFIELD, C. J. This case has been a good deal examined by the court at the former hearings. The only difficulty which seemed ever to exist, as matter of fact, in regard to the regularity of the administrator's sale, was as to the license in fact being issued to the administrator *de bonis non*. One appearing of record to the first administrator, and none to the second, raises a very natural doubt whether the sale was not, in fact, made upon the former license. The necessity of some sale of real estate seems to have been apparent, from the debts exceeding the amount of the personalty. The probate court did order a sale of the real estate, *i. e.*, the farm in question, in general terms. This would be a sufficient ground from which to presume the necessity of the sale. Indeed, after such an order, and the actual sale, we should scarcely allow an inquiry into

the foundation of such an order. That being a matter within the exclusive jurisdiction of the probate court, unless the order showed upon its face that it was made for some other purpose than the payment of debts, or when other means sufficient existed, we should, I think, not allow the jurisdiction to be defeated by proof out of the record. And all deficiencies in the recitals of the order will be supplied by intendment.

And as it was competent for the court of probate to sell the whole real estate, the same being difficult of division, if they deemed it expedient or conducive to the interest of the estate, a general order of sale of this real estate being made, and the whole being sold, it should be, perhaps, presumed that the sale proceeded upon such judgment and discretion of the probate court, or upon the necessity of selling the whole for some sufficient reason.

If a license to sell be shown, it will be presumed to have been upon sufficient previous notice, and the other preliminary proceedings to have been regular, the bond and oath of office, etc., as in other cases. The presumption, *omnia rite acta*, applies with especial force to the proceedings of courts of probate. And after so great a lapse of time, although we cannot make any presumption against the plaintiffs, on the ground of possession merely, we certainly should be at liberty to take into account the enhanced difficulty of showing the true state of the facts, as they existed at the time, and the imperfect manner in which the business is known to have been transacted, at that early day, and the probability that if such an order had existed, it might not have been recorded or preserved, and the extreme improbability that if such an order had existed, and had not been recorded or preserved, that its existence could not be shown.

No part of the evidence admitted in the trial in the county court is specially objected to. It is said it is slight, circumstantial, and fanciful, in general terms. But when we come to examine it in detail, and to look into the charge of the court, it seems to us the trial was managed with very considerable care and circumspection. It may be true that the jury have found the fact of a license to Jenks upon very slight grounds, and that the rules for weighing the evidence given to the jury are calculated to make the most of it. We think that is so, and we think it commendable, both in the court and jury. It is certainly very much to be regretted that after such a lapse of time, when there is every reason to believe that the administra-

tor accounted for the avails of the whole sale, and thus the price of the land came, very obviously, to the use of the heirs, that any technical defect in proceedings should defeat the title, and bring loss and ruin upon those who have trusted to the regularity of these judicial sales.

We could not, we think, suggest any improvement in the mode in which the county court have carried out the purpose of this court, in granting the new trial: See *Doolittle v. Holton*, 26 Vt. 588; and the result is certainly one which might have been, and perhaps ought to have been, accepted.

Judgment affirmed.

ALL PRESUMPTIONS ARE IN FAVOR of the validity of the proceedings of probate courts. For example, the absence of a petition for an order of sale of property will not invalidate a sale thereof. The record must affirmatively show that no petition was filed: *Alexander v. Maverick*, ante, p. 693; see *Soye v. McCallister*, ante, p. 689, and note; *Worthy v. Johnson*, 52 Am. Dec. 399.

MONTPELIER v. EAST MONTPELIER.

[29 VERMONT, 12.]

RIGHTS AND FRANCHISES OF MUNICIPAL CORPORATIONS CAN NEVER BECOME VESTED RIGHTS AS AGAINST STATE.

SO FAR AS PUBLIC AND MUNICIPAL FRANCHISES AND EXISTENCE OF MUNICIPAL CORPORATIONS ARE CONCERNED, the legislature may exercise over them exclusive control, and may constitutionally enlarge, restrain, and even destroy their municipal existence. This may be done although the municipality is trustee for a charity.

LEGISLATURE MAY DIVIDE MUNICIPAL CORPORATION INTO TWO SEPARATE MUNICIPALITIES, and may also direct a division of the property of the original town, held under its original charter in its corporate and municipal capacity, and which was to be used for municipal purposes.

ACT OF LEGISLATURE SEPARATING MUNICIPAL CORPORATION INTO TWO SEPARATE MUNICIPALITIES HAS NO EFFECT upon property held by the original city in trust for specific purposes mentioned in its charter.

WHERE MUNICIPAL CORPORATION WAS TRUSTEE FOR ALL PERSONS RESIDING WITHIN ITS TERRITORY, of certain lands, their rents and profits, and was by the legislature divided into two separate municipalities, the trust survives to such inhabitants, residing within such territorial limits, and the original town having been destroyed, and no trustee being in existence, a court of equity will appoint one whose duty it will be to take charge of the trust property, and hold the same subject to the direction of the inhabitants of the original town.

THIS was a bill brought by the town of Montpelier against the town of East Montpelier. The bill alleged the organization

of the town of Montpelier, and the granting to the inhabitants within its territorial limits of the land rights recited in the opinion; also that the town leased these lands, collected the rents, and properly expended them; that at the session of the legislature in 1848 an act was passed dividing the town of Montpelier into two new towns, one called Montpelier, the other East Montpelier; that the legislature, in making this division, made no provision for the disposition of this trust estate, and appointed no one to take charge of these public land rights, to collect and expend the rents, etc.; that most of said land rights lie within the territory of the town of East Montpelier, the inhabitants of which claim them for themselves; that they have already collected considerable rents, issues, and profits from said land rights, and that they exclude the inhabitants of the town of Montpelier from any participation therein. The bill prayed that the town of East Montpelier be decreed to pay over all money it had collected as rents; that it be perpetually enjoined from the further collection thereof or interference therewith; that a trustee be appointed, with authority to take charge of, control, and manage said lands and rents; and that such trustee be instructed by the chancellor as to the mode of appropriating such trust funds. Defendants' demurrer to this bill was sustained, and plaintiff appealed.

Heaton and Reed, and T. P. Redfield, for the orators.

Peck and Colby, and J. A. Wing, for the defendants.

By Court, ISHAM, J. The general question arises in this case whether the plaintiffs are entitled, upon the facts admitted by the demurrer, to the relief prayed for in their bill. In a former case between these parties, 27 Vt. 704, involving the subject-matter now in controversy, it was held that the plaintiffs had not that legal interest in the money for which the suit was brought which would enable them to sustain the action of *assumpsit*. This bill is now brought in behalf of the inhabitants of Montpelier, for the purpose of having the money in the hands of the defendants appropriated as directed in the original charter of the town, and for the appointment of a trustee to collect, manage, and control the trust fund and estate as directed by the charter. The town of Montpelier was originally chartered in 1781, by which charter the territory therein described was incorporated into a township by that name, and its inhabitants were invested with all the rights and immunities which belong to the inhabitants of other towns in this state. It is admitted

by the demurrer, and it also appears from the charter, that among other public rights the state reserved, granted, and appropriated three rights of land for the settlement and support of a minister or ministers, and the social worship of God in that town, and also for the use and support of English schools in such places as shall best accommodate the inhabitants of that township; and when located by the proprietors, it is declared that "the land, together with the improvements, rights, rents, profits, dues, and interests shall remain inalienably appropriated to the uses and purposes for which they are respectfully assigned; and be under the charge, direction, and disposal of the inhabitants of said township forever." There can be no doubt as to the legal construction which should be given to that charter. So far as these rights of land are concerned, the town of Montpelier as originally chartered, and as a municipal corporation, is invested with the legal title and interest to these lands in trust for the use and benefit of those who were and should thereafter become inhabitants of the territory described in that charter. The town as a municipal corporation became the trustees of the grant, and the inhabitants of that territory the *cestuis que trust*, or persons beneficially interested; and the avails of those rights of land, when received by the town, are to be under the direction and disposal of its inhabitants, for the specific purposes mentioned in the charter. That construction was given to this grant in the case reported in 27 Vt. 704, and that decision is regarded as a satisfactory exposition of the views now entertained on the several questions which have arisen out of that charter and grant. The construction of that charter should obviously be the same in equity as at law.

The town of Montpelier, as originally chartered, was invested with the powers of a municipal corporation, and like all other towns in this state, was instituted as an auxiliary of the state in the regulation and establishment of its form of government. The rights and franchises of such municipal corporations can never become vested rights as against the state. It was so held by Justice Johnson in *People v. Morris*, 13 Wend. 331, and Chancellor Kent has observed that "a public corporation is not a contract within the purview of the constitution when instituted for purposes connected with the administration of the government." For that reason, so far as their public and municipal franchises and existence are concerned, it has become a well-settled principle in the courts of this country, that the legislature may exercise over them exclusive control, and constitution-

ally may enlarge, restrain, and even destroy their municipal existence, as the public interests may require. Such an act defeats no vested rights, nor does it impair the obligation of any contract: *Daniel v. Mayor etc. of Memphis*, 11 Humph. 558. They have also under their control the disposition of its corporate property, or that which is held for municipal and corporate purposes. Hence, in the division of towns, where a part of one town is set off and incorporated into a new town, or annexed to another town, a division of its corporate property is generally made by the act making the division. But while this legislative power may be exercised over public and municipal corporations, it has as uniformly been held that towns and other public corporations may have private rights and interests vested in them under their charter; and as to those rights, they are to be regarded and protected the same as if they were the rights and interests of individuals, or of private corporations; and grants of property to them, in trust for other purposes than corporate and municipal use, are no more the subject of legislative control than are the private and vested rights of individuals. It was upon this ground that it was held in the case from 27 Vermont, that the act of the legislature of this state dividing the original township of Montpelier, and from that territory incorporating the towns of Montpelier and East Montpelier, and dividing also the debts, choses in action, and property of the original township between those towns, in proportion to their grand lists, had no effect whatever upon these rights of land, nor upon the rents and profits arising from them. The statute constitutionally directed a division of the property held by the town of Montpelier under its original charter in their corporate and municipal capacity, and which was to be applied for municipal purposes, but it had no effect upon this property, held by them in trust for the specific purposes mentioned in the charter, and which was not designed for their use as a municipal corporation. These principles are fully sustained in *Dartmouth College v. Woodward*, 4 Wheat. 663; *Daniel v. Mayor etc. of Memphis*, 11 Humph. 558; *Trustees of Aberdeen Academy v. Mayor of Aberdeen*, 13 Smed. & M. 645; *Bailey v. Mayor of New York*, 3 Hill (N. Y.), 541 [38 Am. Dec. 609]; *Harrison v. Bridgeton*, 16 Mass. 16; *Angell & Ames on Corp.*, sec. 767; and various other cases to which we were referred in the argument of the case.

The act of 1848 dividing the town of Montpelier, as it was originally chartered, and thereupon incorporating two new towns,

abolished its corporate and municipal existence. It has ordinarily been the course in this and other states, when a town has been divided, to set off a portion of its territory to another town, or to organize that part into a new town, leaving the town itself to exist under its charter as if no division had been made, but with a diminished territory. In such case, unless some provision is otherwise made by the statute making the division, the former corporation retains all the property held by the town before its division, and is subject to all its obligations and duties: *Windham v. Portland*, 4 Mass. 384; *Dighton v. Freetown*, Id. 539; *Minot v. Curtis*, 7 Id. 441; *First Parish etc. v. Dunning*, Id. 445; *Hampshire v. Franklin*, 16 Id. 86. But in the division of the town of Montpelier a different course was pursued. In the case from 27 Vermont, in speaking of the division of the town under the act of 1848, it was observed that "from the peculiar and explicit language of the act, it is clear that it was the intention of the legislature to make two new and distinct corporations; and the effect of this, from necessity, must be to abolish the old municipality."

It was, upon that view of the case, held that the parties were without remedy at law. The new town of Montpelier was not the trustee of this property, and as a corporation they had no interest in the trust fund. These rights of land were not conveyed to them in trust, and therefore the suit could not be sustained by them at law. That the former township of Montpelier, to which this property belonged, and in which the legal title to these lands and the money arising from their use was vested, was abolished by the operation of that statute, we must therefore consider as having been settled in this state by that decision, and from which we are not now at liberty to depart; and on this demurrer we are not to presume that the division was made without the consent of all interested in the matter. But the beneficial interest and rights of the inhabitants of Montpelier as it was originally chartered remain unaffected, and as perfect as if no division had been made. The township of Montpelier being abolished by that act of the legislature, there is consequently no person or body corporate in existence in whom the legal title of this trust property is vested. The trust estate and the persons beneficially interested remain, but there is no trustee or person in whom is vested the right to collect and receive the avails of that property, for the purposes to which they were appropriated. If, in ordinary cases, the state can abolish the corporate and municipal existence of a town, and from that ter-

ritory establish two new towns, when it is deemed necessary as auxiliary to the state in the regulation and establishment of its government, we think there can be no insuperable difficulty in the exercise of that power in this case, though it has the incidental effect to leave this trust estate and fund without the trustee as created by the charter. It is not the case where individual trustees, while living, are removed from their trust by an act of the legislature, nor where the number of the trustees is increased by the addition of others without the consent of parties interested. Such acts have been held invalid and unconstitutional. In such cases the legislature can no more defeat the title of a trustee, or affect his right over the trust fund, than they can divert or destroy the fund itself. But this principle must not be regarded as depriving the state of their power to alter or abolish the municipal organization of towns, when it is deemed necessary for public interests. If a town was organized for the purpose of aiding the state in sustaining its form of government, the power must necessarily reside in the state to abolish that organization, when it ceases to have that effect. That power is inherent in every state; it is a part of its sovereignty, and the exercise of that right is necessary to establish and sustain its government. It is the greater right to which all others are held subservient. It is not competent for a town or any other mere municipal organization which is made the trustee of such an estate, or of any charity, to set up a vested right of that character as against the government, and thereby prevent the state from changing its political and municipal organization as the public interests may demand. If towns, by their charter or in any other way, are made trustees of such an estate for such purposes, their right and title as such is held subject to be defeated whenever the state shall deem it necessary to abolish their existence as a town or as a municipal organization. This case, therefore, is one in which the trust estate and fund is in existence, the same as if the town had never been divided. The inhabitants of the territory of Montpelier as it was originally chartered are entitled to the use and disposal of that fund as is provided in that charter; but there is in existence no trustee having the legal title to that estate, or to the avails arising from it. In such case, the relief should be granted for which this bill is brought.

It is a settled rule in equity that a trust shall not fail for want of a trustee. If a trustee has been named who refuses to accept the trust, or who has since deceased, or if from any other

cause there is a failure of a regular appointed trustee, a court of equity will take upon themselves the due execution of the trust, and if necessary, will appoint other trustees to carry the trust into effect: *De Peyster v. Clendining*, 8 Paige, 296; *Peter v. Beverley*, 10 Pet. 532; 2 Story's Eq. Jur., secs. 976, 1059, 1061. As there is now no trustee who is authorized to take charge of these lands, or of the rents and profits arising from their use, we think the orators are entitled to the relief for which this bill is brought; and among the sources of relief therein mentioned, a trustee or trustees should be appointed by the chancellor, whose duty should be to take charge of this entire trust property, and hold the same subject to the direction and disposal of the inhabitants of the territory of the town of Montpelier as it was originally chartered, and for the purposes specified in that charter.

The decree of the chancellor dismissing the bill must be reversed, and the case remanded to the court of chancery, with directions to appoint a trustee or trustees of that trust property, and appropriate the same as directed in the charter.

FOR GENERAL REVIEW OF EXTENT of the legislative authority over public and municipal corporations, and their rights, liabilities, property, and contracts, see 1 Dillon on Mun. Corp., c. 4. As to the dissolution of municipal corporations, and its effect upon their creditors and property, see same book, chapter 7. There is no restriction on the general powers of the legislature to make division of towns or public corporations, unless it be found in the constitution of the state: *Id.*, sec. 127. The power of the legislature over a municipality is not affected by the circumstances that it is, by its charter, made the trustee of a charity: *Id.*, sec. 37.

THE PRINCIPAL CASE IS CITED *arguendo* in *Atkins v. Town of Randolph*, 31 Vt. 226, where it is held that so far as a municipal corporation is endowed with the power of contracting, and of acquiring and disposing of property, it stands on the same ground of exemption from legislative control and interference as a private corporation. See *White v. Fuller*, 38 Id. 193.

STATE v. ABBEY.

[29 VERMONT, 00.]

OFFICIAL CHARACTER OF JUSTICE OF PEACE OR OF MINISTER OF GOSPEL IS ESTABLISHED *prima facie* by proof that for several years previous, as well as at the time in question, he had been and was in discharge of the duties of such positions respectively, and generally reputed to be such in the vicinity where they lived.

MARRIAGE CERTIFICATE IS ADMISSIBLE IN EVIDENCE against a defendant, not as proof of his marriage, but in connection with his previous declara-

tions, in which he had stated that he was married, and supported his assertion by exhibiting this certificate.

STATUTE-BOOKS OF SISTER STATE, PURPORTING TO BE PUBLISHED UNDER ITS AUTHORITY, are admissible and competent proof of its statute law. IN INDICTMENT FOR BIGAMY, UNDER SECTION OF STATUTE WHICH RECITES that certain acts shall amount to that offense "except in the cases mentioned in the following section," the exceptions contained in such section need not be negatived.

IN INDICTMENT FOR VIOLATION OF STATUTE TO WHICH THERE IS EXCEPTION IN ENACTING CLAUSE, the state must negative the exception, and state in the indictment that the defendant is not within it; but if there be an exception in a subsequent clause or subsequent section of the statute, it is a matter of defense, and is to be shown by the defendant as a defense.

IF EXCEPTION IS SO INCORPORATED WITH AND BECOMES PART OF PENAL ENACTMENT as to constitute a part of the definition or description of the offense, an indictment for the violation of such statute must negative the exception. It is the nature of the exception, and not its location, which determines the question.

INDICTMENT for bigamy. The opinion states the facts.

Heaton and Reed, for the respondent.

F. F. Merrill, state's attorney, for the prosecution.

By Court, ISHAM, J. The respondent, under several counts in this indictment, has been convicted of the crime of bigamy. His marriage at Sydney, in the state of New York, with Lodema Spickerman, his former wife, by James Hewson, acting as justice of the peace, was proved by witnesses who were present and witnessed the marriage ceremony. The proof was sufficient, *prima facie* at least, that Hewson was regularly appointed to that office. For several years previous, as well as at that time, he had been and was in the discharge of the duties of such justice, and was generally reputed to be such in that vicinity. In 1 Greenl. Ev., sec. 92, the rule is given, "that it is not necessary to prove the written appointment of public officers. All who are proved to have acted as such are presumed to have been duly appointed to the office, until the contrary appears, whether in a civil or criminal case." That is the English rule, and which has been generally recognized in this country: *Hopley v. Young*, 8 Ad. & El., N. S., 63; *Town of Plymouth v. Painter*, 17 Conn. 585 [44 Am. Dec. 574]; *McCoy v. Curtice*, 9 Wend. 17 [24 Am. Dec. 113]. The same observations may be made in relation to the second marriage of the respondent with Eliza Guernsey at Saratoga, in the state of New York, by the Rev. Mr. Woodbridge. The actual celebration of that marriage by Mr. Woodbridge, and that he was known and reputed to be a

minister in that place, was proved by a witness present at the time of that marriage. The declarations of the respondent, made a few days after the marriage, and immediately after he came to this state, that Eliza was his wife, that they were married at Saratoga by the Rev. Mr. Woodbridge, was competent evidence, not only of his identity, but of that marriage: *Regina v. Simmons*, 1 Car. & K. 164, note *a*; *Truman's Case*, 1 East P. C. 470; 2 Stark. Ev. 894. The certificate of the officiating minister would not, probably, be evidence of the marriage when offered for that purpose on the part of the state; but when it was referred to by the respondent as evidence of the truth of his declarations, it was properly received in connection with those declarations to show that he was the person who, under the name of Lyman A. Abbott, was at that time married to Eliza Guernsey.

In relation to the admission of the revised statutes of New York, the rule is now well settled in this and other states that such statute-books, purporting to be published under the authority of the state, are competent proof of its statute law: *Young v. Bank of Alexandria*, 4 Cranch, 384; *Raynham v. Canton*, 3 Pick. 295; *Muller v. Morris*, 2 Pa. St. 85; *Danforth v. Reynolds*, 1 Vt. 265. Whether the reports of adjudged cases, accredited in the state where made, can be used for the purpose of proving its common and unwritten law, is not a question arising in the case; for though they may have been used for that purpose on the trial of this case, no exceptions were taken for that matter. The exceptions are confined to the admission of the revised statutes. We perceive no error in the ruling of the court on any matter which arose on the trial of this case before the jury.

A more difficult question arises on the motion in arrest. It is insisted that it should have been alleged in the indictment that the respondent was not within any of the exceptions mentioned in the act. This objection is urged as fatal to all the counts in the indictment. The Compiled Statutes, 560, sec. 5, provides that "if any person who has a former husband or wife living shall marry another person, or shall continue to cohabit with such second husband or wife in this state, he or she shall, except in the cases mentioned in the following section, be deemed guilty of the crime of polygamy, and shall be punished," etc. Section 6 then provides "that the act shall not extend to any person whose husband or wife has been continuously beyond the sea or out of the state for seven years together, and

the party marrying not knowing the other to be living within that time, nor to persons divorced, or when the marriage has by decree of the court been declared null and void, nor to persons when the former marriage was within the age of consent, and not afterwards assented to." This question, and under this statute, was referred to in the case of *State v. Palmer*, 18 Vt. 573, but left undecided. It was justly said in the case of *Smith v. Moore*, 6 Me. 274, that on this subject "there seems to be many shadowy distinctions, the sound reason and good sense of which are not easily discoverable." The general rule is thus given: "If there is an exception in the enacting clause, the party must negative the exception, and state in the indictment that the respondent is not within it; but if there be an exception in a subsequent clause, or subsequent section of the statute, it is a matter of defense, and is to be shown by the other party:" *State v. Palmer*, 18 Vt. 573; *State v. Barker*, Id. 197; *State v. Butler*, 17 Id. 149. The rule is founded on the general principle that the indictment must contain the statement of those facts which constitute an offense under the statute. A *prima facie* case must be stated; and it is for the other party for whom matter of excuse exists to bring it forward in his pleading or defense. In saying that an exception must be negatived when made in the enacting clause, reference is not made to sections of the statute as they are divided in the act; nor is it meant that because the exceptions are contained in the section containing the enactment it must for that reason be negatived. That is not the meaning of the rule. The question is, whether the exception is so incorporated with and becomes a part of the enactment as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. "It is the nature of the exception, and not its location," which determines the question. Neither does the question depend upon any distinction between the words "provided" or "except," as they may be used in the statute. In either case, the only inquiry arises, whether the matter excepted, or that which is contained in the proviso, is so incorporated with as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it should be negatived; otherwise it is a matter of defense. These rules are sustained by the authorities as they are collected in 8 Am. Jur. 233; and *Ex parte Barthelmy*, 1 Lead. Crim. Cas. 255, and note.

It is said that there is a middle class of cases, namely, where the exception is not in express terms introduced into the enacting clause, but only by reference to some subsequent clause, or prior statute; as where the words "except as hereinafter mentioned," or words of similar import, are employed; and that in those cases the exceptions must be negated: *Ex parte Barthelemy*, 1 Lead. Crim. Cas. 260, note. The statute on which this indictment is framed has in the section of its enactment a reference to the subsequent section for an enumeration of the cases to which the act does not extend. This case would seem to fall within that classification. The necessity in such cases of negating the exceptions in the indictment cannot arise from the mere fact that a reference to the excepted cases is made in the section containing the enacting clause. There is no greater reason in that rule than in saying that the exceptions of a statute must in all cases be negated, because they are placed in the section containing the enacting clause, as they may be divided in the act—a rule discarded by elementary authors as well as by adjudged cases. The same principle should govern this class of cases which governs other classes, and the exceptions should be negated only where they are descriptive of the offense or define it; but where they afford matter of excuse merely, they are to be relied upon in defense. The question is one not only of pleading, but of evidence, and where the exceptions must be negated in the indictment, the allegations must be proved by the prosecution, though the proof may involve a negative: *State v. Buller*, 17 Vt. 150. As the same reasons exist in one class of cases that exist in the other, the same principle should apply. The case *State v. Barker*, 18 Id. 195, is a good illustration of the rule where the exception in the statute should be and was required to be negated. Not all labor and business on the sabbath is forbidden by the statute on which that prosecution was had, but that only which is unnecessary, and which is not a matter of charity. That exception defined the kind of labor forbidden, and qualified the whole enacting clause. The same rule was recognized in the case of *Smith v. Moore*, 6 Me. 274. It was not every neglect by the executor to file the will within thirty days that constituted the penal matter; but it was the unexcused neglect, thus defining and qualifying the act which constituted the matter for which the penalty was given. To prove that the executor neglected to file the will within thirty days would not make even a *prima facie* case; it must also be proved that it was unexcused. For that reason, it was held the exception should be negated. The

cases of *Spieres v. Parker*, 1 T. R. 141. and *Gill v. Scrivens*, 7 Id. 27, rest upon the same ground.

The case of *Commonwealth v. Hart*, 1 Lead. Crim. Cas. 250, is a forcible illustration of the rule where exceptions in a statute should be, and where they are not required to be, negatived. The act of 1852 in Massachusetts provided that "no person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof, without being duly authorized, on pain of forfeiting," etc. "Provided, that nothing in the act shall be construed to prevent the manufacture or sale of cider for other purposes than that of a beverage, or the sale and use of the fruit of the vine for the commemoration of the Lord's Supper." The words "without being duly authorized" defined and qualified the act forbidden by the statute. It was not all sales or manufacture of intoxicating liquor which were forbidden, but only such as were unauthorized; hence the want of authority should be averred and proved, though it might involve the proof of a negative. But the matter embraced in the proviso did not define, qualify, nor was it descriptive of the matter prohibited in the enacting clause. When it was alleged in the indictment, and proved on trial, that the respondent was a common seller of spirituous and intoxicating liquors without being duly authorized, the offense was fully made out; a *prima facie* case was alleged and proved, and it was for the defendant to prove that he was within any of the cases mentioned in the proviso. The case of *Steel v. Smith*, 1 Barn. & Ald. 94, is of the same character, and is so considered by Metcalf, J., in the case above cited. See also *Rex v. Pearce*, Russ. & Ry. 174; *Rex v. Robinson*, Id. 321. In the case of *Rex v. Baxter*, 2 East P. C. 781, S. C., 5 T. R. 83, the act provided that "in all cases where goods have been stolen, except where the person committing the felony shall have been already convicted, etc., every person who shall buy or receive such goods, knowing them to have been so taken, shall be deemed guilty," etc. In this act, it will be perceived that the exception is contained in the body of the enacting clause; still it was held that it was matter of defense, and need not be negatived in the indictment. It is difficult to make a distinction between that case and the one under consideration. It may be true that one of the arguments of Buller, J., is not sustained by later authorities; but we do not perceive that the case itself has ever been questioned in any adjudication of the court in that country or in this. The doctrine of that case is approved in Archb. Crim. Pr. 153; 3 Ch.

Crim. L. 959; and rests upon the authority of *Rex v. Pollard*, 2 Ld. Raym. 1370.

The fifth section of the act on which this indictment is drawn contains the enacting clause; in which the exceptions are made of those cases which are specified in the sixth section. The cases excepted do not define or qualify the offense created by the enacting clause. If the facts are alleged in the indictment and proved on trial, that the respondent had a former husband or wife living, and married another person, or continued to cohabit with such second husband or wife in this state, the offense is fully made out. A *prima facie* case is stated and proved. If, in fact, the former husband or wife of the respondent had been continually beyond the sea or out of the state for seven years together, and the respondent had married again, not knowing the other to be living within that time, or if the respondent had been divorced, or the marriage had been declared null and void by the sentence of a court, or if the former marriage was within the age of consent, and not afterwards assented to, those facts should be relied upon and proved by the respondent in his defense. As was observed by the court in the case of *State v. Barker*, 18 Vt. 197, "the facts are peculiarly within the knowledge of the respondent," and the *onus* of their proof should rest on him.

The sixth section declares that "the provisions of the preceding section shall not extend to any person," etc. This is strictly an exception, and "that which is excepted out of an act is out of its provisions;" as much so as if the act had never been passed. Cases excepted from the act necessarily do not define, qualify, or in any way affect the provisions of the enacting clause. It is a statutory provision, overriding the whole act, that to those cases the act does not extend. In such cases, exceptions need not be negatived, but are to be treated as matters of defense, and are to be relied upon by the respondent as such: *Lawton v. Hickman*, 9 Ad. & El., N. S., 563, 58 Eng. Com. L. 561, 588; *Thibault v. Gibson*, 12 Mee. & W. 94, and note; *Simpson v. Ready*, Id. 734. The difficulty and impracticability arising from a different construction of the act is itself a good reason why it should not be adopted; particularly as all the matters embraced in those exceptions are peculiarly within the knowledge of the respondent. This being the only objection taken to the several counts in this indictment, we think the motion in arrest must be overruled.

PROOF THAT PERSON IS ACTING JUSTICE OF PEACE, without showing his commission from the governor, is a sufficient proof of his authority to solemnize a marriage: *State v. Robbins*, 44 Am. Dec. 64; see also note to *State v. Hodgkins*, 36 Id. 750.

MARRIAGE CERTIFICATE AS EVIDENCE: See note to *State v. Hodgkins*, 36 Am. Dec. 750. Statutes, whether public or private, may be proved by a copy of the laws in which they are included, as published by authority of the legislature of the state where they are in force: *Gray v. Monongahela N. Co.*, 37 Id. 590. Where an offense is created by statute, and there is an exception in the enacting clause, an indictment for such offense must negative the exception; but if there be a proviso therein which furnishes matter of excuse for the defendant, the indictment need not negative it: *State v. Godfrey*, 41 Id. 382. The rule that an indictment must negative exceptions in a statute does not apply to a case where the charge preferred *ex natura rei* conclusively imports a negative of the exception: *State v. Price*, 37 Id. 81. An indictment under one section of a statute need not negative an exception contained in a subsequent section thereof: *State v. Shiffelt*, 64 Id. 190.

CERTAIN SECTION OF ACT WHICH PROHIBITED SALE OF GOODS without taking out a license—excepted from the provisions of the act goods manufactured in that state. In an indictment for the violation of this statute, it was held not necessary for the prosecution, in order to make out a *prima facie* case, to prove where the goods were manufactured, as such fact would be peculiarly within the knowledge of the respondent, and should be proved by him as matter of defense: *State v. Hodgdon*, 41 Vt. 139. The prosecution should show that the respondent does not come within the exceptional clause of the statute, where the exception is descriptive of the offense or defines it, but where the exception affords matter of excuse merely, and does not define nor qualify the offense created by the enacting clause, it is not required to be negated by the prosecution: *Id.*, citing the principal case.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

RAINES v. BARKER.

[13 GRATTAN, 128.]

VIRGINIA STATUTE OF 1849 DOES NOT APPLY TO WILL PREVIOUSLY MADE, so as to determine its validity or effect, though the testator died after that statute was enacted, such wills being expressly exempted from its operation.

ENGLISH RULE IS THAT AS TO LANDS WILL SPEAKS AT DATE, but as to personalty, at the death of the testator.

TESTATOR MAY DEVISE AFTER-ACQUIRED LANDS under the Virginia statute of 1785, but not unless an intent to do so appears from the language of his will: *Allen v. Harrison*, 3 Call, 289.

AFTER-ACQUIRED LANDS ARE NOT WITHIN CLAUSE "WITH EVERY ARTICLE OF PROPERTY belonging to me, excepting the wearing apparel," annexed to a direction in a will, under the Virginia statute of 1785, to sell certain specific tracts of land and shares of stock, "with all my household and kitchen furniture, all my stocks of all kinds, plantation tools and implements."

AFTER-ACQUIRED LANDS DO NOT PASS BY WORDS "BALANCE OF MY ESTATE," in a will under the Virginia statute of 1785.

ERASURE, BY TESTATOR, OF EXECUTOR'S NAME AFTER EXECUTION OF WILL, and the insertion of another name, it not appearing when the alteration was made, is of no importance in determining when the will is to be deemed to have been made, for the purpose of ascertaining what statute governs it.

EJECTMENT by the heirs at law of John Barker, deceased, to recover a certain tract of land sold by the executor to the defendant Raines. The land was purchased by the testator in 1849, he having previously, in 1842, made a will emancipating his slaves, and directing his executor to sell certain tracts of land specifically described, not including the land in controversy, also certain shares of factory and railroad stock, "with

all my household and kitchen furniture, all my stocks of all kinds, plantation tools and implements, with every article of property belonging to me excepting the wearing apparel that may be in the house at the time of my death." The will further provided for keeping the negroes on the plantation until the proceeds of the sales were collected, and that they should then be sent to Africa, the proceeds of the sales being used to pay expenses and to provide for their comfort. There was a bequest of a certain sum, and then the will provided that "the balance of" the testator's "estate, after paying expenses," was "to go to furnish the expense of carrying them away and furnish them in a situation to live." There was a special verdict setting out the will and finding certain other facts, sufficiently stated in the opinion, respecting an erasure and interlineation appearing in the will. Judgment for the plaintiffs on the verdict, and the defendant obtained a *supersedeas* from the court of appeals.

Collier, for the appellant.

D. May, for the appellees.

By Court, DANIEL, J. By the eleventh section of chapter 122 of the code of 1849, it is declared that a will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. And as the will, on the construction of which the right to the land in controversy depends, was admitted to probate in 1852, some question might have arisen as to whether we should apply to the will the rules prevailing at its date (1842), or the statutory rule just cited, were it not for the provisions of the twenty-second section of the same chapter (122) declaring that the preceding sections of the chapter shall not extend to any will made before the act should be in force, but that the validity and effect of such will shall be determined by the laws in force on the day before this chapter should take effect in like manner as if those laws, so far as they relate to the subject, were therein enacted in place of such sections.

The English rule, that as to lands the testator speaks at the date of his will, and as to personals at his death, had not been subjected here, prior to the adoption of the code, to any legislative change other than that made by the act of 1785. That act directs "that every person, etc., shall have power, etc., to devise all the estate, etc., which he hath, or at the time of his death

shall have, of, in, or to lands," etc. In the case of *Allen v. Harrison*, 3 Call, 289, the extent of the change in the old rule contemplated by that act was the subject of a very full examination; and the court were unanimous in the opinion that the act only gave a power to devise after-acquired lands, leaving it to the discretion of the testator to dispose of them or not; that in order to produce that effect there should be something indicating an intention to exercise the power, and that where there was nothing in the language of the will to show that the testator evidently contemplated a disposition of his after-acquired lands, a devise of his lands should be held to refer to the lands owned by him at the date of his will. The same interpretation of the act must have also prevailed in the case of *Bagwell v. Elliott*, 2 Rand. 190, and was fully recognized by the supreme court of the United States in the case of *Smith v. Edrington*, 8 Cranch, 66.

It is true that in several of our sister states, where statutes have been enacted similiar in their provisions to our act of 1785, a strong disposition has been manifested so to construe those statutes as to assimilate much more closely the rule in question to the rule which applies to wills of personals. Thus in the case of *Loveren v. Lamprey*, 22 N. H. 434, where the words of the bequest on which the case turned were, "I give and bequeath to my beloved wife Ruth Loveren all the residue and remainder of my estate, wherever it may be found, to her, and her heirs and assigns," etc., it was held that it was the intention of the testator to pass to his wife all his property owned by him at the time of his decease, after paying his debts, etc., and that the premises in controversy, purchased by the testator after the making of his will, passed by it. So in the case of *Cushing v. Ayhoyn*, 12 Met. 169, like views prevailed, and the court announced the broad proposition that where a will purports to dispose of the testator's whole estate or property, the intention is to dispose of all the estate or property of which the testator may be the owner at the time of his death; and that such intent would be inferred unless something in the will should be opposed to such an inference. And so again a similar decision was made in the case of *Willis v. Watson*, 4 Scam. 64. In the state of Kentucky, however, where our act of 1785 has been adopted, the interpretation of the act given in the case of *Allen v. Harrison*, 3 Call, 289, has been closely adhered to: *Warner v. Swearingen*, 6 Dana, 196; *Ross v. Ross*, 12 B. Mon. 437. In the first of these cases, the reasons for the adoption of this interpretation of the act are fully and clearly stated, and the main argument in favor of the competing construc-

tion successfully met. That argument was, that the English doctrine declaring that as to land or other real or immovable estate a testator speaks at the date of his will, was founded main'y on the terms of the statute of wills of Henry VIII, empowering all persons having legal titles to lands held in free and common socage to dispose of such lands by will, and all persons having such titles to lands held in chivalry, to dispose of two thirds thereof by will, etc.; and that as now by the act of 1785 a testator has a power to dispose not only of the lands which he hath, but also those which at his death he shall have, there was no longer any sufficient legal reason left for intending that in a general devise of his lands a testator speaks only of the lands which he has at the date of his will.

The chief justice (Robertson), in delivering his opinion in *Warner v. Swearingen*, *supra*, fully meets this view, by showing from the English cases that "the civil-law rule of making a testator speak at his death, and not at the date of his will, not only was never applied to immovable property, but never would have been applied to land, or any interest therein, even had a prospective freehold as well as leasehold interest therein been always devisable in England; for it seems," he proceeds, "not to have been applied to general bequests of chattel interests in land, even though a testator might always in England have effectually bequeathed such interest afterward to be acquired by him. And the principal reasons of this exception from the rule of the civil law are: 1. That such an arbitrary rule of construction frequently operates inconsistently with a testator's intentions; and 2. That as even a chattel interest in land is not so mutable or fugitive, either in itself or in the proprietorship of it, as that kind of property which is perishable, and in fact movable, neither policy nor convenience required that a general bequest of it should be construed as speaking at the testator's death, when in most cases he intended to speak only when he published his will." And he came to the conclusion that under the operation of the act of 1785 the true doctrine was: "As to a general devise of lands, like that of England respecting the like testamentary dispositions of leasehold interests in land; that is, that *prima facie* the testator contemplated only such interests as he owned when he published his will. But that if he manifested an intention to devise whatever interests he might own at his death, then, and then only, his will should be understood as speaking at his death as to land as well as any other property; because then, and only then, such is made to appear to have been

in fact his will, and here he has a legal right to effectuate such a will." And the court accordingly held that a devise by the testator of "the residue of his estate" did not pass lands acquired by him subsequently to the date of his will.

Though it be conceded, therefore, as I believe it must, that in a majority of the states whose statutes of wills are, in the particular in question, like our act of 1785, the decisions have gone far towards abolishing the old English rule, and though now by statute in England, 1 Vict., c. 26, as well as here, a devise of lands, like a bequest of personals, is made to speak as if executed immediately before the death of the testator; yet as the authority of *Allen v. Harrison*, 3 Call, 289, has not, so far as I have seen, been ever questioned, but on the contrary, stands supported by the decisions of a sister state where our act of 1785 has been in terms adopted, I feel no hesitation in coming to the conclusion that the will in this case must be interpreted under the rule which holds the testator, no contrary intention appearing, as speaking in respect to his lands at the date of the will.

Applying to the will this test, I have been unable to discover in its terms anything to raise a serious doubt as to the propriety of the interpretation which the circuit court has given to it. The words "every article of property belonging to me" were used, no doubt, as suggested by the counsel of the appellees, to carry any article of personal property which the testator supposed might, perchance, be held not to be embraced in the description immediately preceding, of "household and kitchen furniture, stocks, plantation tools and implements." And the words "the balance of my estate," if held as intended to embrace lands at all, must, under the requirements of the rule by which the construction of the will is governed, be referred to the balance of the testator's lands which he owned at the date of his will.

It does not seem to me that the fact that the testator, subsequently to the date of his will, erased the name of Henry E. Scott and substituted that of John R. Mason, as his executor, is of any value in the controversy. The date of this alteration is not fixed by the verdict; it is only found to be "subsequent to the original writing of the will." And as the verdict finds that the testator was on terms of intimacy with Scott up to the time of his (Scott's) death, which occurred in February, 1847, the probability is that the change was made soon after Scott's

death, and before either the adoption of the code or the purchase of the land, which occurred in March, 1849.

I think that the judgment ought to be affirmed.

The other judges concurred in the opinion of DANIEL, J.

Judgment affirmed.

AFTER-ACQUIRED LANDS OF TESTATOR PASS BY WILL, WHEN AND WHEN NOT: See *Doe d. Wynne v. Wynne*, 57 Am. Dec. 139, and note; *Bowen v. Johnson*, 61 Id. 110.

PRATT v. WRIGHT.

[13 GRATTAN, 175.]

CONDITION IN GUARDIAN'S BOND NOT CONFORMING TO STATUTE, BUT TO OLD FORM adopted under a prior statute, and long continued in use through the inadvertance of the justices, should not, it seems, be hastily pronounced invalid.

STATUTORY BONDS SUPERADDING CONDITIONS CONTRARY TO STATUTE, or not required by it, to those which are required, are void as to the former, but valid as to the latter, unless made wholly void by the statute, expressly or by necessary implication.

GUARDIAN'S BOND SUPERADDING ONEROUS CONDITION NOT REQUIRED BY STATUTE, nor appropriate to the nature of the office, to indemnify the justices, etc., is nevertheless valid as to those conditions contained in it which are within the statute.

GUARDIAN'S BOND OMITTING MATERIAL PART OF STATUTORY CONDITION is valid as to what remains.

CONDITION OF GUARDIAN'S BOND NEED ONLY BE VALID TO EXTENT OF BREACH assigned to sustain an action thereon.

FAILURE TO RECITE GUARDIAN'S APPOINTMENT IN CONDITION OF BOND filed by him does not vitiate it.

COURT OF EQUITY HAS JURISDICTION TO COMPEL NON-RESIDENT GUARDIAN AND SURETIES TO ACCOUNT for a balance due his ward.

BILL in equity against the plaintiff's late guardian and his sureties, for an account as to a balance alleged to be due him. Wright, the guardian, had removed from the state. The sureties who appeared insisted in their answers that the guardian's bond was void for certain defects on its face, stated in the opinion, and the court below so ruled. The court also held that it had no jurisdiction as to Wright, who was proceeded against as an absent defendant, and not served with process, and had no property within the jurisdiction. Bill dismissed as to all the defendants, and the plaintiff appealed.

John M. Patton, jun., for the appellant.

Patton, for the appellee.

By Court, DANIEL, J. The appellees, Millar and Humphreys, insist, respectively, in their several answers, that the bond on which the suit is founded is not binding on the securities, because of faults apparent on its face. They do not, however, either of them, point to the particular feature or features of the bond in which the supposed faults are to be found; and the circuit court simply responds to this ground of their defense by declaring the bond null and void. We are thus left to conjecture the reasons on which the objections to the validity of the bond were rested and sustained.

The act in force at the time of the execution of the bond (the act of 1819) requires that every guardian shall give bond to the justices, with sufficient security, conditioned "for the faithful execution of his office." And it will be seen that the condition of the bond in question varies from that required by the act in two particulars. Instead of requiring simply "the faithful execution of his office," it requires the guardian to pay and deliver to his wards all such estate as now is or hereafter shall appear to be due to them, when and as soon as they shall attain to lawful age, or when thereto required by the justices of the said court; and also further requires that the guardian shall keep harmless the justices from all trouble and damages that shall or may arise about the said estate. And it is in one or both of these departures from the terms of the act that the defects, if any, in the bond are supposed to reside. It must be conceded that these departures involve variances, not only in form, but also to some extent in substance, from the bond which the law directs to be given; the first clause in the condition stopping short of the full requirement of the act, and the last superadding a new and independent condition which the act does not mention. It is insisted, however, by the counsel for the appellant, that all question as to the force of these defects on the validity of the instrument ought to be regarded here as closed by the decision of this court in the case of *Call v. Ruffin*, 1 Call, 333, in which a judgment rendered on a bond exactly like this was affirmed, and by the fact that the bond here has strictly pursued the form prescribed in the books of forms which have been, and still are, usually consulted by the justices and clerks as guides in taking such bonds.

The decision in *Call v. Ruffin*, *supra*, does not seem to me to be entitled to all the weight which is claimed for it as an authority applicable to this case. The bond in that case, as will be seen from the statement of Judge Pendleton in delivering the opin-

ion of the court, was dated in 1779, at which period the act of 1748 was still in force. And by said last-mentioned act the direction to the courts in respect to the bonds of guardians was that they should "take good security of all guardians by them appointed for the estates of the orphans to them respectively committed:" Hen. Stats., c. 4, sec. 4, p. 450. The first clause of the condition of the bond, therefore, in that case was almost in exact conformity with the very words of the act under which it was taken.

Still, as the justices, most probably not adverting to the alteration in the condition of the bond first required in the act of 1785, and since followed in the act of 1819, have continued to use the old form, a declaration of the invalidity of bonds on the score of such defects as are alleged against the one under consideration could not fail to be productive of most serious evils. And even if I entertained the opinion that a free and untrammelled consideration of the question as an open one would probably result in a conclusion unfavorable to the validity of such bonds, I would, in view of the consequences likely to ensue from such a decision, feel strongly inclined, if not indeed constrained, to defer to the usage. I am, however, satisfied that a reference to the authorities will result in showing that the defects in the bond under consideration do not affect its efficacy to bind the parties to the extent of their undertaking.

The effect on the validity of the bond of a public officer, of superadding a condition not required in the act directing the bond to be taken, is very fully considered by Judge Story, in delivering the opinion of the supreme court of the United States in the case of *United States v. Bradley*, 10 Pet. 343. The English cases are there reviewed, and the doctrine is deduced from them, as well as from previous decisions of the supreme court, that there is no solid distinction in cases of this sort between bonds and other deeds containing conditions, covenants, or grants not *malum in se*, but illegal at the common law, and those containing conditions, covenants, or grants illegal by the express prohibition of statutes. In each case the bonds or other deeds are void as to the conditions, covenants, or grants that are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is where the statute has not confined its prohibitions to the illegal conditions, covenants, or grants, but has expressly or by necessary implication avoided the whole instrument to all intents and purposes. The judge proceeded further to declare that inasmuch

as the act merely prescribed the form and purport of the bond to be taken, and did not declare that all other bonds not taken in the prescribed form should be utterly void, it would be a mischievous interpretation of the act to hold that under such circumstances it was the intendment of the act that the bond should be void. And that it was a sufficient compliance with the policy of the act, and in consonance with the dictates of the common law and of common sense to hold the bond void as to any condition imposed beyond what the law required, and good so far as it was in conformity to the act. The cases of *Central Bank v. Kendrick*, Dudley (Ga.), 67; *Speck v. Commonwealth*, 3 Watts & S. 324; *Commonwealth v. Pearce*, 7 T. B. Mon. 317; *Walker v. Chapman*, 22 Ala. 116, are all to the same effect; see also 2 Rob. Pr. 35, 36. Even, therefore, if the condition in respect to indemnifying the justices imposed upon the guardian some new and onerous duty wholly foreign to the nature of his office, we should be well justified in refusing to "call in aid a distinct condition which might be illegal to vitiate that which is clearly legal:" *Collins v. Gwynne*, 20 Eng. Com. L. 423.

That the want of conformity in the first clause of the condition to the terms of the act does not vitiate the bond, would seem to be still more obvious. It would seem to be absurd to hold the parties not responsible for a failure of the guardian to perform one of his duties, and that the main duty of his office, simply because the condition of the bond, falling short of the comprehensive language of the act, has failed to stipulate in terms for the performance of all the duties of his office. It is enough that the condition is co-extensive in its stipulations with the breach or breaches alleged.

The suggestion of insufficiency in the bond because of the failure in the condition to recite the appointment of Wright as guardian is fully met by the decision in *Call v. Ruffin*, 1 Call, 133, before cited. The same objection to the bond was there taken; and indeed, that was the only objection to the sufficiency of the bond to which the attention of the court was in that case specially directed in the assignment of errors. The objection was, as has been seen, of no avail. And no ground is laid in subsequent legislation on the subject from which to infer the necessity of such a recital now.

I do not see on what ground any doubt can be raised as to the jurisdiction of the circuit court. The bill calls for an account of the guardianship; and if the circuit court had not been of the opinion that the bond was null and void, and con-

sequently that there was no foundation for relief against the surviving surety and the representatives of the sureties that are dead, I apprehend it would have found no obstacle, arising out of the non-residence of the guardian, to prevent its taking jurisdiction of the cause as well to him as to the other defendants. It is true that in *Call v. Ruffin*, 1 Call, 133, it was held that the ascertainment, by previous suit against the guardian, of the demand against him, was not in all cases essential, as it was in a suit upon an executor's bond, to the maintenance of a suit at law on the bond; but that case has never been understood by the courts as settling that the right so to proceed at law on the bond was in exclusion of the jurisdiction of chancery to hold the guardian to account, and his securities with him, to the payment of any balance found due to his ward. If the guardian in this case was within the jurisdiction of the court, neither he nor his sureties could be heard to object that the proceeding ought to have been by suit at law instead of by bill in equity. His absence does not oust the court of chancery of its jurisdiction. His sureties or their representatives are within the jurisdiction of the court, and no reason is perceived why the suit may not proceed, as in other cases where some of the defendants are within and others without the jurisdiction of the court. His absence may be the occasion of inconvenience and trouble in making up the account, but it presents no legal bar to the relief sought.

It seems to me that the decree ought to be reversed, and the cause remanded for further proceedings in accordance with the principles herein declared.

MONCURE and SAMUELS, JJ., concurred in the opinion of DANIEL, J.

LEE, J., concurred in the opinion, except that he was not disposed to give as much weight to the practice as to the forms of the bonds as was attached to it in the opinion.

Decree reversed.

ADDING CONDITIONS IN STATUTORY BONDS NOT AUTHORIZED OR REQUIRED BY STATUTE.—The cases upon this subject are not in entire harmony, although, with some exceptions, they will be found to be in substantial accord.

WHERE ADDITIONS OR VARIATIONS IN CONDITION OF SUCH BOND ARE IMMATERIAL, and there is substantial conformity to the statute, the bond is valid to the full extent of the condition: *Smith v. Allen*, 21 Am. Dec. 33. Thus the mere reduplication of adverbs in the condition of an official bond,

though not authorized by statute, does not invalidate the bond: *Murfree on Official Bonds*, sec. 173. Where, for instance, the condition of such a bond, as prescribed by statute, is "for the faithful performance" of the duties of the office, a bond conditioned that the incumbent of such office "shall well and truly, faithfully, firmly, and impartially execute and perform the duties of his said office," the bond is valid: *Mayor v. Evans*, 31 N. J. L. 342. So if the condition of an official bond is more specific than the statute requires, but substantially conforms to the statutory condition, imposing no greater obligation, the bond is good: *Boring v. Williams*, 17 Ala. 510. A prison-bonds bond, conditioned that the prisoner "shall keep within the bounds of the prison until he be discharged by due course of law," the latter clause being in excess of the statutory condition, is valid, the addition being deemed immaterial: *Smith v. Allen*, *supra*. So, in the case of an attachment bond, where an addition to the condition prescribed by statute means no more than may be implied from the prescribed condition: *Kahn v. Herman*, 3 Ga. 266. So where the condition of an insolvent's bond under the poor-debtor's act is that the insolvent shall appear "at the next May term" of court, whereas the statutory condition is that he shall appear at the term of court at which the application for the benefit of the act may be made, the variance is not so material as to invalidate the bond: *Commissioners v. Way*, 3 Ohio, 103.

MATERIAL ADDITION TO CONDITION PRESCRIBED BY STATUTE IN STATUTORY BOND.—If the condition expressed in a statutory bond is materially in excess of that prescribed by statute, the case is not so clear, nor are the decisions entirely reconcilable. The bond may, in such a case, be void so far as the condition is in excess of the statute, or void as a whole, or valid as a whole, according to its nature and the nature of the condition.

1. *Bonds Partly Valid and Partly Void for Variance from Statute in Condition, when.*—The prevailing doctrine of the decisions on this subject is that laid down in the principal case, that where the conditions of a statutory bond are separable, and part are authorized by the statute and part not authorized or even prohibited, and the statute does not expressly or by necessary implication declare it void as a whole, the conditions not authorized or prohibited may be rejected as surplusage and the residue sustained as a good statutory bond *pro tanto*, the rule being the same as that applied to common-law bonds partly good and partly bad: *Burrall v. Acker*, 35 Am. Dec. 582; *Polk v. Plummer*, 37 Id. 566; *Dixon v. United States*, 1 Brock. 177; *United States v. —*, Id. 195; *United States v. Hodson*, 10 Wall. 395; *United States v. Mora*, 97 U. S. 413; *State v. Layton*, 4 Harr. (Del.) 512; *Lambden v. Conoway*, 5 Id. 1; *Justices v. Wynn*, Dudley (Ga.), 22; *Gibson v. Beckham*, 16 Gratt. 321; *George A. Rubelman Hardware Co. v. Greer*, 21 Cent. L. J. 108. This rule applies to administrators' and executors' bonds: *State v. Layton*, 4 Harr. (Del.) 512; *Justices v. Wynn*, Dudley (Ga.), 22; *Woods v. State*, 10 Mo. 698; *Vroom v. Smith*, 14 N. J. L. 479; *Gibson v. Beckham*, 16 Gratt. 321, explaining and qualifying *Morrow v. Peyton*, 8 Leigh, 54. So, in Tennessee, by express statute: *Walker v. Potilla*, 7 Lea, 449; Tenn. Code, sec. 2224. So the rule applies to guardians' bonds, as in the principal case: *Reed v. Hedges*, 16 W. Va. 167, 194; *Barnum v. Frost's Adm'r*, 17 Id. 408, 423, citing the principal case: *Shunk v. Miller*, 5 Pa. St. 250; and to official bonds generally: *Polk v. Plummer*, 37 Am. Dec. 566; *United States v. Bradley*, 10 Pet. 343; *United States v. Brown*, Gilp. 155; *Walker v. Chapman*, 22 Ala. 116; *State v. Findley*, 10 Ohio, 51; *Speck v. Commonwealth*, 3 Watts & S. 324. Thus where the condition prescribed is "for the true and faithful discharge of the duties" of the office, and the condition expressed in the bond is that the officer "has

truly discharged, and shall continue truly and faithfully to discharge, the duties" of said office, the retrospective part of the condition may be rejected as surplusage: *United States v. Brown*, Gilp. 155. So, where the condition prescribed for a treasurer's bond was that he should "pay over according to law all moneys . . . received for state, county, township, or other purposes," and the condition expressed in the bond was that he should "faithfully and impartially discharge all the duties of his said office agreeably to law:" *State v. Findley*, 10 Ohio, 51. In such a case, the condition expressed clearly includes the statutory condition. Mr. Justice Grimké, delivering the opinion in the case last cited, said: "That part which is legal is marked out by the statute-book itself, and is therefore as completely severable from the rest as if the two parts were separated in the condition of the bond. There can be neither mistake, confusion, nor injustice in so holding. The law is not so absolutely a cabalistical science as to refuse to listen to the interpretations of good sense."

The same rule applies to attachment bonds: *Drake on Attachments*, sec. 130; *Ranning v. Reeres*, 2 Tenn. Ch. 263; and to injunction bonds: 2 High on Inj., sec. 1622; *Johnson v. Vaughan*, 9 B. Mon. 217; *Proprietors v. Mussey*, 43 Me. 307; *Holliday's Ex'rs v. Myers*, 11 W. Va. 276, citing the principal case; *George A. Rubelman Hardware Co. v. Greve*, 21 Cent. L. J. 108. So it applies to appeal bonds and bonds on writ of error: *Sanders v. Rivers*, 3 Stew. 109; *McKernan v. Hall*, 1 Yerg. 397; *Terry v. Stukeley*, 3 Id. 505; *Banks v. McDowel*, 1 Coldw. 84; *Sharp v. Pickens*, 4 Id. 268; *Hutchisson v. Fulghum*, 4 Heisk. 550. Where the statute requires an appeal bond to be conditioned for the payment of the costs of appeal only, or the costs and damages, and such a bond is in fact conditioned to prosecute the appeal with effect or to perform the judgment of the appellate court, or the like, the condition will be cut down to that prescribed by the statute, and judgment can be rendered on the bond only for the costs of the appeal, or the costs and damages: *Id.* This was settled in Tennessee, in particular, in the decisions above cited, but it is said in *Sharp v. Pickens*, 4 Coldw. 268, that the doctrine at first might "weil have been questioned."

In bail bonds and recognizances for appearance, also, non-statutory conditions superadded to those which are statutory may be rejected as surplusage, if separable, and the residue held valid if the statute does not make bonds void which do not conform to it: *Muleverer v. Redshaw*, 1 Mod. 35; *Whitted v. Governor*, 6 Port. 335. In *Muleverer v. Redshaw*, *supra*, Twisden, J., referring, doubtless, to *Norton v. Simmes*, Hob. 14, where a bail bond superadding non-statutory conditions was held void under statute 23 Hen. VI., c. 9, because the statute expressly made it so, said: "I have heard Lord Hobart say upon this occasion, 'that because the statute would make sure work, and not leave it to exposition what bonds should be taken, therefore it was added that bonds taken in any other form should be void;' for, said he, the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest."

While it is thus frequently held that a bond superadding to conditions prescribed by statute others which are non-statutory may be sustained as a statutory bond as to the former, rejecting the latter as surplusage, it has been thought to admit of some question whether or not the non-statutory conditions might not be enforced as a common-law obligation independently of the statute. In a number of decisions it has been declared that the non-statutory conditions in such a case were absolutely void: *Hall v. Cushing*, 9 Pick. 404; *Armstrong v. United States*, Pet. C. C. 46; *United States v. Howell*, 4 Wash.

620; *United States v. Humason*, 5 Saw. 537; *George A. Rubelman Hardware Co. v. Greve*, 21 Cent. L. J. 108. In the case last cited, a Missouri case, there was an injunction bond containing some conditions prescribed by statute, and others which were non-statutory, and the action was brought on the latter, disregarding the former; but it was held that it could not be maintained, because the non-statutory conditions were without consideration. Lewis, P. J., delivering the opinion, said: "All the cases show that the interpolation of extrastatutory conditions will not modify the force of a statutory bond, or impair the efficacy of its statutory stipulations. But that an extrastatutory stipulation in such a bond may be enforced alone is quite another proposition. The statute offered to the obligor a restraining order upon certain conditions, and subject to certain consequences in specified contingencies. The terms of the present bond subject him to a condition not imposed by the statute, and this action seeks to fix upon him consequences which were not suggested in the statutory proposal, and which curtail its benefits in a way not warranted by the law. Such a condition is contrary to the manifest policy of the law, and is therefore void. If the obligor has realized the benefits for which the bond was given, he has, in the statutory undertaking, supplied the whole consideration for them which the law exacted. It is as if A should direct his servant to sell a piece of property to B for a certain price. The servant puts an advance upon the price for his own benefit and pockets the difference. This is no less a fraud on the intentions of A because B was willing to pay the excess. The extrastatutory undertaking is without any consideration which the law will recognize."

The cases hereinafter mentioned, in which it has been held that bonds containing such extrastatutory conditions could be sustained as common-law obligations, seem to us to be at variance with the doctrine of this decision.

2. *Bonds Containing Extrastatutory Conditions Held Void, when.*—Of course where the statute, expressly or by necessary implication, declares void a bond conditioned otherwise than as prescribed by the statute, there can be no question as to its entire invalidity. So if the bond is exacted *colore officii*, it is void: *Smith v. Allen*, 21 Am. Dec. 33; *Burrall v. Acker*, 35 Id. 582; *United States v. Tingey*, 5 Pet. 115; *United States v. Humason*, 6 Saw. 199; *Wooters v. Smith*, 56 Tex. 198. So if the good and bad conditions of a statutory bond are not separable, the whole bond is void: *Nottingham v. Giles*, 1 Pen. 120; *United States v. Brown*, Gilp. 180, explaining *United States v. Morgan*, 3 Wash. 10.

In Texas it seems to be established that if a bail bond, official bond, or other statutory bond contains extrastatutory conditions more onerous than the statute requires, the whole bond is void: *Janes v. Reynolds's Adm'rs*, 2 Tex. 250; *Johnson v. Erskine*, 9 Id. 1; *Turner v. State*, 14 Tex. App. 168. So in Georgia, where a bail bond omitted a statutory condition beneficial to the bail, and contained an extrastatutory condition which was prejudicial, it was held void: *Tucker v. Davis*, 15 Ga. 573.

3. *Bond Containing Extrastatutory Conditions Valid as Common-law Bond, when.*—It has been held in a number of well-considered cases that where a statutory bond is voluntarily given containing conditions not prescribed by the statute, and is not declared void by the statute, expressly or by implication, nor contrary to public policy, though not valid in its entirety as a statutory bond, it is good as a common-law bond: *United States v. Hodson*, 10 Wall. 395; *United States v. Mora*, 97 U. S. 413; *Hester v. Keith*, 1 Ala. 316; *Ware v. Jackson*, 24 Mo. 166; *Cleaves v. Dockray*, 67 Id. 118; *Morse v. Hodson*, 5 Mass. 314; *Philadelphia v. Shallcross*, 14 Phila. 135; *Slutter v. Kirken-*

dall, 100 Pa. St. 307; *Ring v. Gibbs*, 26 Wend. 502. Thus an official bond imposing an obligation greater than the statute required was held binding on both principal and surety to the full extent of its terms, where such construction was not forbidden by the statute nor contrary to the intention of the obligors: *Philadelphia v. Shallcross*, 14 Phila. 135; *Cleaves v. Dockray*, 67 Me. 118. So where one voluntarily gave a forthcoming bond with a condition more onerous than the officer had a right to require, it was held valid to its full extent as a common-law bond: *Slutter v. Kirkendall*, 100 Pa. St. 307. Where the condition of an executor's bond does not conform to the statute, but requires nothing more than the statute requires, and the bond is voluntarily given, and is not made void by the terms of the statute, it is unquestionably good as a common-law obligation: *Ordinary v. Cooley*, 30 N. J. L. 179. See also *Woolwick v. Forrest*, 2 N. J. L. 115; *Middletown v. McCormick*, 3 Id. 500, for an application of the same rule to other official bonds.

A replevin bond executed under statute 11 Geo. II., c. 19, sec. 23, conditioned to appear and prosecute the action with effect, to make return of the property if return was adjudged, and to save the sheriff harmless, the latter clause being in excess of the statute, was nevertheless held valid in *Dunbar v. Dunn*, 10 Price, 54. The court "declared they were clearly of opinion . . . that the condition to indemnify the sheriff was consistent with the established form of replevin bond as used in practice; and that there was no necessity to pursue so strictly, as it had been urged the defendant ought to have done, the language of the statute in taking such bonds, as the 11 Geo. II. had not declared bonds taken in any other than a prescribed form should be void." They observed "that the form of the bond now in use was common before the statute, and the condition was in every respect reasonable and unobjectionable, and that the sheriff would be also entitled to take another bond for his own indemnity, if that part of the condition which was now objected to were excluded, the effect of which would be to put the party to the expense of two bonds." See *Morris on Replevin*, 270; see also *Morse v. Hodsdon*, 5 Mass. 314; *Lamden v. Conoway*, 5 Harr. (Del.) 1. A bastardy bond superadding to the statutory condition for appearance a condition to abide the judgment is good, such condition being common in such bonds: *New Haven v. Rogers*, 32 Conn. 221.

THE PRINCIPAL CASE IS CITED to the point that a guardian's bond whose condition is less extensive than the statute prescribes is nevertheless valid, in *Holliday's Ex'rs v. Myers*, 11 W. Va. 294; and *Gibson v. Beckham*, 16 Id. 333. It is cited also in *Reed v. Hedges*, Id. 194, to the point that a guardian's bond need not recite the guardian's appointment; and in *Chapman v. Commonwealth*, 25 Gratt. 736, to the proposition that an officer and his sureties are estopped by the official bond executed by them from denying the validity of his appointment.

CRIBBINS v. MARKWOOD.

[13 GRATTAN, 495.]

SALE OF REVERSION BY EXPECTANT HEIR MAY BE RESCINDED FOR INADEQUACY of price, according to the established doctrine in England.

RESCISSION OF SALE OF REVERSION BY ONE NOT EXPECTANT HEIR, FOR INADEQUACY of consideration, was not a settled principle of equity jurisprudence in England at the date of American independence.

POLICY OF THIS COUNTRY FAVORS FREE ALIENATION of property.

SALE BY ADULT OF VESTED EXPECTANT INTEREST in reversion or remainder is not against public policy in Virginia, and is binding if not procured by ill practice.

INADEQUACY OF PRICE IS NOT ALONE GROUND FOR RESCINDING SALE OF REVERSION by a young man who had just attained his majority, but it may, with other circumstances, be evidence of fraud.

RETENTION OF PART OF PRICE BY PURCHASER IS NO GROUND OF RESCISSION of a sale of a reversion, especially where it was withheld by consent.

BILL to rescind and set aside a sale of the plaintiff's interest in certain realty. The case is stated in the opinion. The court below found no actual fraud, but decreed a rescission on the ground that it was a sale of a reversion for half its value by an inexperienced youth. The defendant appealed.

Baldwin, for the appellant.

Michie, for the appellee.

By Court, ALLEN, P. It appears from the pleadings and proofs in this cause that the father of the appellee departed this life intestate about fourteen years before the institution of this suit; that he owned at the time of his death a house and lot in the village of Mount Sidney, Augusta county, and an outlot containing about eleven acres adjoining the village. He left four children (all infants), one of whom died under age. The appellee was the eldest child; and when he attained his full age on the twenty-fourth of November, 1851, he was the owner of an undivided one third of said property, subject to the dower interest of his mother. The estate was a vested interest, two thirds a present, and one third an interest in reversion; the whole was in the occupation and possession of his mother, to whom dower had not been assigned. Immediately after arriving at full age, the appellee offered his interest in the property for sale to sundry individuals. In less than two months after he attained his majority he made sale of it to the appellant for one hundred and sixty dollars, of which one hundred dollars was to be paid down and sixty dollars to be paid in nine months, in paper. On the sixteenth day of January, 1852, the appellee conveyed the property to the appellant; on the tenth of March thereafter his mother died with pulmonary consumption, after a confinement to her bed of about a month. The appellee instituted this suit on the twentieth of March, 1852, to set aside the sale and to annul the deed, upon two grounds: 1. Of actual fraud, circumvention, and imposition on the part of the appellant; and 2. Of constructive fraud supposed to be imputed by the policy of the

law to such a bargain, growing out of the mere inadequacy of the price. The evidence shows that the appellee had not actually resided with his mother for several years before he attained full age; and that for some years he had been doing business for himself, uncontrolled by his mother or any other person. But as he was a frequent visitor at her house, he had better opportunities than the appellant of informing himself of the condition of her health. There is no allegation in the bill or anything in the proof to show that the appellee was not fully acquainted with his rights, and the extent of his interest in the property when he contracted to sell it. He seems to have been a young man of at least ordinary intelligence, and as he had been doing business on his own account for some years, he must have had some experience in dealing. At the time of the sale he was indebted in a sum not exceeding fifty dollars, but no portion thereof was due to the appellant; and it is not proved that there was any relation of confidence between the parties. The proposition to sell appears to have been made by the appellee to the appellant; and this after he had been offering his interest in the property for sale to others. Upon the facts in the record, the court below held, and as I think correctly, that there was not the least reason for imputing any actual fraud to the appellant in this transaction.

In view of the facts that the property was undivided, that dower had not been assigned, that the widow from the death of her first husband had been, and at the time of the sale was, in the actual possession of the whole thereof, the court below seems to have considered that the interest sold by the appellee was merely reversionary. So regarding it, the question is presented for the first time in this court for direct adjudication, How far it is incumbent on the party dealing with the seller of such an expectant interest to establish, not only that there was no actual fraud, but that he had agreed to pay a fair and adequate consideration?

In reference to expectant heirs, and those sustaining that character, the doctrine seems now to be fully established in England that they are entitled, for mere inadequacy of price, to have the contract rescinded, upon the terms of refunding the money and interest received. In *Edwards v. Burt*, 15 Eng. L. & Eq. 434, decided in 1852, the lord chancellor observes that "it is unnecessary to canvass or discuss the principles on this subject, for the rule on it was finally and distinctly established by the house of lords in the case of *Lord Aldborough v. Tyre*, 7

Cl. & Fin. 436; and that case, following several of the previous authorities, clearly establishes that the purchaser of a reversionary interest, or at all events the purchaser of such an interest from an expectant heir, or from a person standing in the situation of an expectant heir (and the plaintiff Mrs. E. clearly sustained that character), is bound, if the transaction is impeached within a reasonable time, to satisfy the court that he gave the fair market value for what he purchased."

In that case property had been bequeathed to the mother of Mrs. E. for life, with remainder to Mrs. E. for life. At the time of the sale the mother was seventy-four years of age, and Mrs. E. was thirty-eight. So situated, she clearly sustained, according to this opinion, the character of one standing in the situation of an expectant heir. After this recent and unequivocal recognition of the rule as finally established, it is unnecessary to review the long series of cases upon this subject. They will be found, and the substance of them set out and commented upon, in the note to the case of *Lord Chesterfield v. Janssen*, in *White & Tudor's Lead. Cas.* 344, 393. See also *Davis v. Duke of Marlborough*, 2 Swanst. 113, 147, note a.

Contracts with persons sustaining the character of expectant heirs, entered into during the life-time of the parent or relation standing in *loco parentis*, for the purchase of interests dependent upon the bounty of such parent or relation, may be obnoxious to the imputation of fraud on the rights and interests of the parent or relation. In *Chesterfield v. Janssen*, 2 Ves. sen. 125, 156, Lord Hardwicke said: "A fraud may be collected or inferred, in the consideration of this court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement." Under this head he enumerates marriage-brocade contracts, in which neither of the contracting parties are deceived, but they tend to deceive others; contracts to return a part of the portion of the wife; contracts by some creditors to secure a larger portion of their debts before they will unite in a deed of composition with other creditors; and in the same class he mentions catching bargains with heirs, reversioners, and expectants in the life-time of the father, etc. "The father, ancestor, or relation from whom was the expectation of the estate is kept ignorant, and is so misled and seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand."

In conformity with this rule, it was held in *Boynton v. Hubbard*,

7 Mass. 112, that a contract made by an heir to convey, on the death of the ancestor living the heir, a certain undivided part of what should come to the heir by descent, devise, or distribution, was a fraud upon the ancestor. This deceit, says Parsons, C. J., is relieved against as a public mischief, as being a deceit on the father or other relation, who is thus influenced to leave his fortune to be divided amongst a set of common adventurers, and because it is destructive of all well-regulated control or authority of persons over their children, or others having expectations from them.

The rule, when limited and restricted to the sale of expectancies of the above description, may be sustained by principles applicable alike to all well-regulated communities. It is the policy of every well-constituted society to protect against fraud and to suppress vice. Contracts with young heirs for mere expectancies dependent upon the bounty of the relation tend to encourage both. They are most generally entered into for the purpose of ministering to some secret vicious indulgence. A deceit is practiced on the owner and disposer of the property, and the necessity of concealment subjects the expectant heir, generally young and inexperienced, to oppressive sacrifices.

In the note to *Davis v. Duke of Marlborough*, 2 Swanst. 113, 147, the annotator states that the principle laid down in some of the cases as that on which the doctrine is in part founded would seem to comprehend every person dealing for a reversionary interest; yet he raises the question, whether, in order to constitute a title to relief, the reversioner must not combine the character of heir. He remarks that the reversionary interests, the sale of which has been rescinded from mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor in every instance, except in a few cases which he enumerates, in all of which the sales have been made while the vendors were in distress, and so the transactions were affected with actual fraud.

The doctrine of imposing upon a purchaser from a reversioner, who does not sustain the character of an expectant heir, the heavy burden of showing, in all cases and at all times, that he has paid a full and adequate consideration, has not always been acquiesced in as correct. In some of the earlier cases an opposite rule has been acted on. Thus, in *Nicols v. Gould*, 2 Ves. sen. 422, Lord Hardwicke refused to set aside the purchase of a reversion at an under-value, there being no fraud. He observed: "There is no proof of any fraud or imposition on

the vendor; nothing but suspicion; and therefore it is too much to set aside the purchase merely on the value." In *Griffith v. Spratley*, 1 Cox, 383, the subject of sale consisted in part of a reversion. Lord Chief Baron Eyre remarked "that the case had been much rested upon this, that the satisfaction received was so inadequate in value that it was impossible to resist the inference of fraud which arises from such inadequacy; or, if possible, to make inadequacy itself a distinct principle of relief in equity. But that he knew of no such principle, and the common law knows of none such; that he would never agree that inadequacy of consideration is in itself a principle upon which a party may be relieved from a contract he has wittingly and willingly entered into. But it may be a strong evidence of fraud when the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs." In *Wood v. Abrey*, 3 Madd. 417, the vice-chancellor, Sir John Leach, in reply to the argument that the party was entitled to relief on the ground of the purchase being of a reversion, unless the purchaser could show that the consideration was adequate, observed "that the policy of this rule as to reversions may be well doubted, and if the cases were looked into, it might be found that the rule was originally referred only to expectant heirs, and not to reversioners."

In *Shelly v. Nash*, 3 Madd. 232, the same judge questions the principle and the policy of the rule, arguing to show that sellers of reversions were not necessarily in the power of those with whom they contract; and that persons who sell their reversions from the pressure of distress are thrown by the rule into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them. Sir William Grant, in *Peacock v. Evans*, 16 Ves. 512, says that the tendency of this doctrine is to render all bargains with such persons very insecure, if not impracticable. And again, in *Gowland v. De Faria*, 17 Id. 20, the same judge speaks of the rule requiring such a purchaser to show that a full and adequate consideration was paid as imposing a heavy burden upon him; but that his case is an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. In *Jeremy's Equity Jurisdiction*, 398, the writer draws a distinction between contracts with expectant heirs and contracts with the actual owner in remainder or reversion; and conceiving that contracts of the latter class are not necessarily of a nature to excite suspicion, he classes them with bargains to be set aside on account of fraud, and not merely on the ground of inadequacy of price.

The rule, therefore, if distinctly settled in England as being applicable to contracts with reversioners who do not combine the character of expectant heirs, has only been so established within a recent period, and not without serious doubts as to its propriety. The authorities referred to show that it could not be regarded as a settled principle of equity jurisprudence at the date of American independence. The subject was alluded to in the case of *McKinney v. Pinckard*, 2 Leigh, 149 [21 Am. Dec. 601]. The case was, however, decided on other grounds; the judge who delivered the opinion of the court remarking that it was not necessary in that case to decide whether every seller of an expectant interest is to be treated as an expectant heir; and therefore he gave no opinion on that point. The question has not been adverted to in any other case, and is therefore one of the first impression in Virginia.

There would seem to be no greater reason for restricting the right of the owner of a reversion or vested remainder than of property in his actual possession. A reversion is an interest of value. It has its market price; it may be subjected to the claims of creditors; and the owner himself may make a valid sale at public auction, according to all the authorities. Yet, according to the doctrine of the recent English cases, every person entitled to such reversion or remainder is treated as an expectant heir, and in the language of Lord Thurlow in *Gwynne v. Heaton*, 1 Bro. C. C. 1, 9, "there is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant against the effects of his own conduct." It becomes, therefore, important to inquire into the principle upon which this doctrine, as applied to reversions and vested remainders, is supposed to rest; and to ascertain how far the policy on which it is founded is applicable to the condition of this country. If the doctrine grows out of a policy hostile to our system of government, and incompatible with the habits of our people, there can be no propriety, when not controlled by binding authority, in our following the more recent English cases.

The case of *Twisleton v. Griffith*, 1 P. Wms. 310, contains the first enunciation of a policy which at length has prevailed in the English courts. In that instance, a vendor thirty-four years of age, married, and the father of a family, was the owner of a remainder until after his father's death, who was old, and died two years after the sale. Lord Northington denied relief, yet upon a rehearing before Lord Jeffries, relief was granted;

the chancellor declaring such bargains tended to the destruction of heirs sent to town for education, and to the destruction of families; that he saw no inconvenience in the objection, that at this rate an heir could not sell his reversion. This might force an heir to go home and submit to his father, or bite the bridle and endure some hardships; and in the mean time he might grow wiser and be reclaimed. This, which seems to be the leading case, was one in which the reversioner occupied the position of heir, his father, the owner of the life estate, being regarded as the head of the family.

In the next case, *Cole v. Gibbons*, 3 P. Wms. 290, where the policy of the rule was expounded, the plaintiff claimed a reversion by a bequest of his uncle. Lord Talbot said the cases of heirs were not in point; and because no heir was concerned, and he afterwards confirmed the sale, relief was denied. But the chancellor said that, as to the cases of expectant heirs, it was the policy of the nation to prevent a growing mischief to ancient families, that of seducing the heir apparent from a dependence on his ancestor, who would probably have supported him, and by feeding his extravagances tempting him in his father's lifetime to sell the reversion of the estate which was settled upon him, for as much as it tended to the ruin of families.

Throughout the whole series of cases, the policy announced in the two foregoing cases, of maintaining a due subordination to the head of the family and preventing the breaking up of family estates, seems to be the main foundation to the doctrine. Any person having a reversionary interest to dispose of has, irrespective of his age, come to be classed with an expectant heir, and in the language of Lord Thurlow above quoted, reduced to the situation of an infant against the effect of his own conduct. This no doubt has arisen, in a great degree, from the situation of real property in England. Owing to their practice of strict settlements and the laws of entail, the parent or ancestor is generally a life tenant, and the expectant heir a reversioner. Thus combining both characters, the courts, for reasons of policy, have applied principles adopted to protect the young and inexperienced expectant heir to the owners of reversions and remainders. The reasons of policy which have influenced the English courts have but little application to this country. That due subordination to the head of the family upon which such stress is laid, and which the courts seek to enforce long after the heir has arrived at years of discretion, grows out of the division of ranks which prevails in that country. The political and social pre-

eminence of the governing class must be maintained; and deference to the head of the family in all the relations of life is one of the means by which a distinction of classes and gradation in society is kept up and preserved. The same consideration has operated to prevent the breaking up of estates. Titular rank, without wealth or position, soon ceases to command the respect of the community. To keep property in a particular line, restrictions are imposed upon the free alienation of real estate through the operation of their system of primogeniture, entails, and strict settlements; one of the consequences of which is to combine, in almost every instance, the character of reversioner with expectant heir; and hence the courts have assumed the extraordinary power to continue such reversioner in a state of pupillage long after he has arrived at years of discretion.

No such reasons exist for the recognition of such a doctrine here. The authority of the parent whilst the child is disabled to contract for himself should be enforced by law; for the best security for the morality of the citizen is to be found by preserving unimpaired the family relations. But when legal control ceases, the young man is called upon by the habits of our people, and his duty to the public, to act for himself in all the most important relations of life, uninfluenced by an abject deference to the opinions of others, occupying no higher position in society than himself. Proper reverence is due at all times to the parent from the child; but when the latter has arrived at years of discretion, that respect becomes a moral obligation, which courts are not called upon to enforce. It will be more readily and cheerfully fulfilled when left to the free will of the child and the silent influence of a healthy public opinion, unaffected by legal restrictions upon his dominion over his property.

The policy of our country favors the free alienation of property, is adverse to large accumulations descending in a particular line, and by abolishing entail and primogeniture, encourages an equal distribution amongst all standing in the same relation to the common ancestor. As one of the consequences of our system, it is rarely the case that the reversioner combines the character of expectant heir. Such combination, we have seen, is the rule in England, which has led the courts to confound the reversioner with expectant heir, and to apply the same doctrine to both. In Virginia such combination is the exception. It is not often that the child under the control of the parent or ancestor has a vested interest in his estate. Reversions usually

arise after the death of the parent intestate, and most generally grow out of assignment of dower to the widow, and most remainders are created by the will of the parent making provision for his widow for life. A young man on attaining full age frequently finds himself the actual owner of a vested remainder or reversion expectant on a life estate, and constituting the most valuable property belonging to him. A sale in such cases, in the dawn of manhood, for a moderate consideration, is most generally for the interest of the owner. Judiciously invested, or well improved in a country where the field for enterprise is so wide and inviting, it may lay the foundation of a fortune far exceeding the value of the whole fee-simple when the life estate terminates.

By the English rule, the owner of a reversion or vested remainder cannot derive benefit from his property by negotiating a private sale. He must either sell at public auction or hold on to the dry reversion until, perhaps, the decline of life. Unable to deal with it as with his other property, he is thrown into the hands of the speculator, who will indemnify himself for the hazard he runs in being called upon at some future day to show by the vague opinion of witnesses—whose testimony of former value will be insensibly influenced by the actual condition of things when they testify—that the price was adequate at the time of the purchase.

Whatever principle may be adopted in reference to contracts with expectant heirs, secretly selling the chance of a parent's or some relation's bounty, it seems to me that the actual adult owner of a vested interest in property, whether in reversion or remainder, should not be reduced to the condition of pupillage from regard to any supposed rule of public policy, or for the purpose of extending to him any particular protection. No such rule of public policy exists in this country; and all attempts to fetter the action of the owner by restricting his power of alienation operate injuriously to him. They lessen competition, and so depreciate the market price of his property. There is no valid reason for making this an exceptional case. The contracts of such reversioners or remaindermen, like all other contracts, if made by those competent to contract, if they are not gained by ill practice, nor made against the laws, should be kept.

This court in several instances has repudiated the doctrine of imputing fraud as a matter of law: *Davis v. Turner*, 4 Gratt. 422; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; *Bank of Alexandria v. Patton*, Id. 499; and the inquiry in reference to sales by rever-

sioners or remaindermen should be whether in the particular case actual fraud existed. Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to and weighed in determining whether the bargain in the particular instance is not so unconscionable as to demonstrate some gross imposition, circumvention, or undue influence; and so to justify relief on the ground of fraud. In the absence of such proof of actual fraud, I do not think it is incumbent on the purchaser of such an expectant interest to make good the bargain by showing that a full and adequate consideration was paid.

With respect to the consideration in contracts of this kind, it was observed by Lord Hardwicke, in *Nicols v. Gould*, 2 Ves. sen. 422, "that every purchase of this kind must be on the foot of great uncertainty as to the value." And he asks, "Will a court of equity, after the contingency has fallen out one way, enter into the consideration of the value?" Or, as was said by the chief baron, in *Griffith v. Spratley*, 1 Cox, 383: "The value of a thing is what it will produce, and it admits of no precise standard. One man may sell his property for less than another would. He may sell under the pressure of circumstances, which may make a smaller price more beneficial than a greater price would have been under different circumstances. If courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind."

In the case under consideration, many of the witnesses deposed that, in their opinion, the price agreed to be paid was adequate. The testimony on both sides shows that about one thousand two hundred dollars would have been the full market price for the whole fee-simple, if sold upon the usual terms of credit. Deducting one third, four hundred dollars, the value of the widow's dower, and eight hundred dollars remain to be divided amongst the three heirs. A present interest of two hundred and sixty-six dollars and sixty-six and two thirds cents to each, with a reversion in four hundred dollars, the one third expectant on the widow's life estate. This estimate, however, is made upon the market price of the property, supposing the whole fee-simple could have been sold. But it was undivided, and from its nature probably not susceptible of equal division. The consent of the doweress would have been necessary to a sale of the whole, out and out. If she refused, and elected (as in all probability she would) to have her dower laid off, the assignment of dower in such a property would necessarily have

materially impaired the market price of the residue. Under such circumstances, the value of the interest sold by the appellee is at best conjectural. And therefore we need not be surprised that many of the witnesses examined, looking to the mere money value of the interest sold, thought the price to be adequate. The most that can be said is, that perhaps at the time of the sale the price was a low one, and in the event which has happened, that the purchaser has made a good bargain. The inadequacy is very far from being so gross as to shock the moral sense; and has it uniformly been held that inadequacy of consideration between persons who stand upon precisely an equal footing is in equity of no account, unless, from its grossness, it is of itself evidence of fraud.

As to the allegation that the appellant has withheld a portion of the hand payment, it might constitute an objection to the specific execution of the contract at the suit of the appellant, if the same had not been executed; but in this case the contract has been executed by the conveyance. And besides, the retention of a portion of the hand payment is satisfactorily accounted for. The proof shows that it was withheld with the consent of the appellee until some inquiry could be made into the condition of the intestate's estate.

Regarding the case as if the whole interest sold was reversionary, the most favorable aspect for the appellee under which it can be contemplated, he has, in my opinion, failed to make out a claim to relief, either upon the law or the facts of the case. In reality, however, the bulk of the property sold was a present interest in the undivided two thirds. The reversionary interest embraced only the one third to which the widow would be entitled for life. The doctrine of the English courts as to sales of reversionary interests did not apply to the most valuable portion of the property. Even if the English rule were recognized as obligatory, it might still be questionable whether it should be extended to the purchase of such an interest, the larger portion of which was a present interest in the seller. But resting my judgment upon the broader ground before discussed, that the purchaser of such an expectant interest is not bound to show that the price given was adequate, when no fraud is imputed or proved, I do not deem it important to pursue this latter branch of the inquiry any further.

I think the decree was erroneous, and should be reversed, and the bill dismissed. But as the case was one of the first impression, I think it should be dismissed without costs.

The other judges concurred in the results of the opinion of ALLEN, P.

Decree reversed.

INADEQUACY OF CONSIDERATION AS GROUND FOR RESCISSION of contract in equity: See *Osgood v. Franklin*, 7 Am. Dec. 513; *Thompson v. Jackson*, 15 Id. 721; *McKinney v. Pinckard*, 21 Id. 601; *Lester v. Mahan*, 60 Id. 530, and notes. The principal case is cited and commented on as an authority on this point, in *Hale v. Wilkinson*, 21 Gratt. 85, 86.

SALE OF EXPECTANT INTERESTS: See *Trull v. Eastman*, 37 Am. Dec. 128, and note; *Field v. Mayor*, 57 Id. 435. The principal case is cited as partly overruling the English doctrine on this subject, in *Hale v. Wilkinson*, 21 Gratt. 86.

AMICK v. THARP.

[13 GRATTAN, 564.]

OWNER OF LAND WRONGFULLY OVERFLOWED CANNOT ERECT OBSTRUCTIONS to such overflow so as to cast it upon the land of innocent third persons. OWNER OF LOT UPON WHICH CITY HAS DIVERTED DRAIN, obstructing it so as to throw the water back upon a lot above him, is liable therefor, whether the act of the city was lawful or not. Nor is it material that the plaintiff was street commissioner and superintended the work at the time of the original diversion, where neither party owned his lot at that time.

CASE for obstructing a drain, whereby the water therein was thrown back upon the plaintiff's lot. It appeared that the city of Wheeling, in grading a street, filled up a certain ravine, in which water formerly flowed, having first constructed a culvert some distance from the channel, whereby the water was thrown upon the lot now owned by the defendant. The plaintiff was then street commissioner, and superintended the work. Neither party then owned the lots now owned by them. The defendant, having purchased his lot, filled up the ravine thereon, and closed the mouth of the culvert so that the water was thrown back on the plaintiff's lot, and was stagnant. The court below charged, in substance, that the city had no authority so to grade the street in question as to throw the water on the defendant's lot, without compensation, and that if the course of the drain had been changed from the place where it was accustomed to flow so as to cause the water to flow over the defendant's lot to his injury, he had a right to fill up his lot, though it stopped up the drain and caused the plaintiff's lot to be overflowed. Verdict and judgment for the defendant, and the plaintiff obtained a *supersedeas*.

Russell, for the appellant.

Fry, for the appellee.

By Court, DANIEL, J. In the view which I take of this case, it does not seem to me necessary to inquire whether the city of Wheeling, in grading the street and constructing the culvert in the proceedings mentioned, did or did not act in pursuance of a lawful authority. There is nothing in the evidence upon which the instructions of the circuit court are founded to show that these works had caused any obstruction to the course of the branch in its passage over the lot of the plaintiff, or had in any manner become, or were likely to become, the cause of injury to his property till the flow of the water through the culvert was stopped by the defendant. And indeed, the instructions of the circuit court proceed on the hypothesis that the works of the defendant on his own lot were the proximate cause of the overflow of the plaintiff's, and declare to the jury that the defendant had a right to fill up his lot, notwithstanding such filling may have stopped the flow of water through the culvert and caused the same to overflow the property of the plaintiff; provided the jury should believe that the course of the drain was changed by the works of the city above mentioned, so as to cause the water to flow over a different part of his lot from the place where it had always been accustomed to flow; and that the city had no authority so to grade an alley as to throw the water of such a drain on the property of a citizen, without compensation, and thereby to deprive him of the right to exercise any authority as owner which he previously had over his own property.

In Angell on Watercourses, sec. 389, it is said that a party aggrieved may remove a private nuisance, if it can be peaceably done. Thus if a ditch is dug, by means of which the water is diverted from the land of a riparian proprietor, through whose land it would otherwise flow in its natural course, he may go upon the land of the wrong-doer and fill it up. So the law affords the owner of land protection against the flow of back-water on his land or upon his mill; and he may lawfully enter upon the land of the person causing the injury and remove the obstruction by which it was occasioned. And in the same treatise, section 332, it is declared that a riparian proprietor whose lands are directly inundated by the acts of his neighbor can, not only by the common law recover adequate damages, but he is allowed by the same authority to defend his land against encroachments; and if any consequences detrimental to

the wrong-doer result from this course, they afford no legal ground of complaint. The same doctrine is asserted in 2 Hilliard on Real Property, 120, where it is said that if the land of one person is overflowed through the act of another, the former may erect any obstruction which may be necessary to keep off the water, and will not be answerable for damages thereby occasioned to the wrong-doer. But the important qualification is added, that "he cannot lawfully cause damage to third persons by such erection."

In looking to the cases cited in the foregoing passages in support of the proposition therein asserted, it will be seen, I think, that whilst the right of a party aggrieved to protect his property from the injurious consequences of works unlawfully erected by the abatement of such works is well established, the circumstances which justify a resort to counter-works which must result in damage to the property of the wrong-doer are by no means very clearly defined. Be this, however, as it may, I have been unable to find any precedent which would justify a party, in a case like this, where the evidence affords the presumption that there was ample time to resort to other means of protection, in placing such obstructions to the flow of the water as would inevitably cause the overflow of the lands of a third person. And justice and fair dealing would seem to require of a person who, under such circumstances, chooses, instead of resorting to the legal tribunal, to take his redress or protection into his own hands, the caution that his proceedings do not involve the ruin or injury of third parties. It seems to me that the cases which deny to the original wrong-doer the right to recover for damages done to his property by countervailing works have gone full far enough in vindicating the right of self-protection; as under their sanction slight wrongs may in some cases be redressed by very serious injuries. A just deference to the rights of unoffending third parties and a proper regard for the peace and order of society forbid a further extension of the doctrine. Under the instructions of the circuit court, a person whose property is injured in any degree, however slight, by the unauthorized diversion of a stream from its accustomed flow, may justify the erection of any work necessary to the complete protection and full enjoyment of his property, though the necessary consequence is not merely to endanger, but to visit with certain destruction, the property of a neighbor, however valuable; and he may thus, in order to prevent or repair a loss, or obviate even an inconvenience, however trifling, carry ruin to the fortunes of innocent

parties, and then refer them for redress to the remote and perhaps insolvent wrong-doer.

In the absence of authority plainly so declaring the law, I cannot give my assent to a doctrine which may work out such unjust results. On the contrary, justice and convenience seem to me to require, in such cases, that an aggrieved party should not be compelled, in seeking redress, to look beyond the person whose acts are the proximate cause of the injury done to his property. When he shows that but for the act complained of he would have sustained no injury, he establishes a right to have redress at the hands of the person who did it. No sufficient answer to the complaint is made by the plea that such act was done by the defendant to repair an injury to his own property proceeding from the illegal acts of a third person.

The cases in which parties have been held excused for acts done injurious to the property of others, under circumstances of imminent danger expected from fire or flood, furnish, I think, no rule or argument in support of the instructions of the circuit court. In such cases of accidental and extraordinary casualty, where the law is powerless to afford either protection or redress, each person exposed to the danger is left to adopt the best means within his power to avert the threatened mischief; and if consequences prejudicial to the property of others ensue, the defense and excuse are found in the pressing emergency of the occasion. The difference between such cases and those where the parties have it in their power to appeal to the preventive and remedial justice of the court, and have also time and opportunity afforded to select the means of preventing or repairing the mischief without damage to others, is so obvious as to need no comment. And it is also to be observed that even in cases of the threatened outburst of a flood or spread of a conflagration, the right of a person to protect his property cannot be exercised in total disregard of the rights of others. He must still, in the selection of the means of protection within his power, use care to prevent unnecessary injury to the property of others: *Noyes v. Shepherd*, 30 Me. 173, 179 [50 Am. Dec. 625]; *Beach v. Trudgain*, 2 Gratt. 219.

In the first mentioned case, where the defendant was sued for damages resulting from the use of means employed to prevent an expected inundation from the waters of a pond which threatened to do great injury to the property of the defendant and others, he was held to show that he had observed ordinary care in his proceedings. And in the case of *Beach v. Trudgain*, *supra*,

in which parties pulling down a house in a town to arrest the spread of a fire were sued by the owner, this court held that they were responsible for the damages thereby sustained by the owner, if the house might have been prevented taking fire by the use of the means within the power of the parties pulling it down.

If any analogy favorable to the defense could be drawn from the indulgence extended to parties acting under the pressure of imminent danger (and I have already expressed the opinion that the analogy does not hold), I should still be of the opinion that the rule declared by the circuit court was too broad, inasmuch as it asserts the unqualified right of the defendant to use his property under the state of things disclosed in the proofs to the prejudice of his neighbor, without any reference to the consideration whether he might not have prevented damage, as well to his own property as to that of the plaintiff, by the use of other means.

Before a party, in a case of the kind under consideration, should be allowed to repair an injury or indemnify himself against a loss by the employment of means of which mischief to the property of third persons is the natural and inevitable result, he should be at least required to show that he could not have prevented the damage by the use of means involving no greater trouble or expense than that encountered in the use of those selected. And in this case, whilst the ordinary remedies recognized by the law were open to the defendant (which differs his case from those just commented on), there is an absence of any proof to show that he might not have restored the stream to its original channel, or, whilst filling up his lot, might not have provided a passage for the water, so as to prevent the overflow of the plaintiff's land, without any further outlay of money or use of labor than that employed, and without being curtailed in any manner of an equally full and convenient enjoyment of his own lot.

The evidence that the plaintiff was the street commissioner of the city of Wheeling, superintending and directing the work at the time of the grading of the alley and the construction of the culvert, seems to me to make no difference in the case. At that time, the bill of exceptions states, neither the defendant nor the plaintiff had purchased their lots. No portion of the culvert was upon the plaintiff's lot; and his entire connection with it ceased before the defendant became the owner of his lot. The plaintiff, after the culvert was completed, had no control or

power over it. Its continuance was not in virtue of any permission, license, or grant from him. It was wholly the property of the city, by whose order it was built, before the defendant or the plaintiff had acquired any rights of property to be affected by it; and its continuance thereafter, by which alone the defendant could have been injured, was by the authority of the city alone. This evidence of the plaintiff's connection with the works of the city does not seem to have formed in any degree the basis of the instructions given to the jury; and I am of opinion that it does not relieve them of the objections which I have pointed out.

I am of opinion to reverse and remand the cause for a new trial.

The other judges concurred.

The judgment was as follows: It seems to the court that whether the city of Wheeling had or had not lawful authority to grade the alley or construct the sewer in the bill of exceptions mentioned, so as to cause the water which had hitherto flowed over a part of the lot of the defendant to flow over another part of said lot, to the injury of the defendant, the defendant had no legal right to obstruct the flow of water through said sewer so as thereby to cause the water to be dammed and thrown back on the property of the plaintiff, to his injury; and consequently that the circuit court erred in giving the instructions in said bill of exceptions mentioned. It is therefore considered, etc., that the judgment be reversed, etc., with costs, verdict set aside, and cause remanded for new trial; on which the circuit court will not repeat such instructions, if asked.

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2. NOTICE TO PURCHASER AT SHERIFF'S SALE ON MORTGAGE of an existing adverse claim comes too late if the mortgagee had no notice when the mortgage was executed. *Id.*
3. ADVERSE POSSESSION WITH CONSENT AND CONNIVANCE OF MORTGAGOR, unless so open as to be notice, cannot affect the mortgagee. *Id.*
4. POSSESSION OF DISSEISOR, TO GIVE TITLE UNDER STATUTE OF LIMITATIONS must be actual, visible, notorious, distinct, hostile, and of twenty-one years continued duration. *Id.*
5. POSSESSION UNDER ENTRY ORIGINALLY MADE IN FIDUCIARY CAPACITY, to become adverse, must be evidenced by some decisive act or declaration. *Id.*
6. TENANT ENTERING UNDER TITLE OF MORTGAGEE IS PRESUMED TO CONTINUE IN POSSESSION in fidelity to the tenure; but when the mortgagee has notice of his adverse claim he may maintain ejectment. *Id.*
7. ADVERSE POSSESSION FOR TWENTY-ONE YEARS, though commenced before installments were due on a mortgage, would bar the mortgagee. *Id.*

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1. ACCEPTANCE BY TWO JOINT OWNERS OF PERSONAL PROPERTY OF THEIR SHARE OF PROCEEDS OF SALE is sufficient to constitute third joint owner agent to sell. *Davis v. Burnett*, 283.
2. AGENT TO SELL PERSONAL PROPERTY HAS POWER TO BIND HIS PRINCIPAL by warranty of soundness. *Id.*

3. AGENT IS NOT PERSONALLY LIABLE WHO AT TIME OF MAKING CONTRACT DISCLOSES HIS PRINCIPAL; but where he binds himself, he is answerable, and if made to suffer in damages arising out of the contract, he is entitled to compensation from his principal. *Id.*
4. CORPORATION IS LIABLE FOR AGENT'S ACTS, DECLARATIONS, AND FALSE REPRESENTATIONS to the same extent as natural persons. *Henderson v. San Antonio etc. R. R. Co.*, 675.
5. AGENT'S FRAUD OR MISREPRESENTATIONS WITHOUT PRINCIPAL'S KNOWLEDGE or consent nevertheless invalidate a contract entered into on behalf of the principal by the agent within the scope of his authority; or even where the contract is beyond the agent's authority if the principal ratifies it, for he cannot ratify it without assuming responsibility for the fraud entering into it. *Id.*
6. FALSE REPRESENTATIONS BY COMPANY'S AGENT AS TO TIME OF COMPLETING RAILROAD and as to its probable cost, forming the inducement for a contract with it, vitiate such contract, and the company cannot be held excused on the ground that the parties had equal opportunities for knowing the facts. *Id.*

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1. KNOWLEDGE ACQUIRED BY ATTORNEY IN ANOTHER TRANSACTION BETWEEN OTHER PARTIES does not affect one who subsequently employs him, and is not notice to the latter. *Martin v. Jackson*, 489.
2. PROFESSIONAL COMMUNICATIONS.—WHERE PERSON HAS GENERAL CONVERSATION WITH ATTORNEY about a question of law, where no retainer is paid, and there is nothing to show that the person sought the advice with any view to regulate his future conduct in regard to a pending or expected litigation, his communications are not privileged, as being made between counsel and client. *Thompson v. Kilborne*, 742.
3. PRACTICE OF GIVING ADVICE UPON LEGAL SUBJECTS WITHOUT STUDY and examination, and without corresponding pay and a distinct retainer, is a vicious one, which this court strongly disapprove of. *Id.*
4. ATTORNEY DOES NOT MAKE HIMSELF LIABLE AS TRESPASSER by communicating to the sheriff on behalf of his client instructions to levy an execution upon specified property afterwards proved not to be the property of the execution debtor; nor by executing, in his client's name and by his authority, a bond of indemnity to the sheriff. *Ford v. Williams*, 83.
5. BOND OF INDEMNITY UNDER SEAL, EXECUTED BY ATTORNEY WHOSE AUTHORITY WAS BY PAROL, is valid against his client as a simple contract, without regard to the seal. *Id.*
6. FACT THAT ATTORNEY EXECUTES FOR HIS CLIENT BOND OF INDEMNITY UNDER SEAL, when his authority is by parol, does not make him personally liable for the wrongful taking of goods by the sheriff, since the specialty is binding upon his client as a simple contract. *Id.*

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1. EXPRESS PROMISE IS NECESSARY TO REVIVE DEBT BARRED BY BANKRUPTCY DISCHARGE, and such promise must refer to the debt, though it need not be made to the holder thereof. It need not be in any particular form of words, but may be made by any words, or perhaps by signifying a present willingness to pay. *Bennett v. Everett*, 498.
2. BARE ACKNOWLEDGMENT OF DEBT BARRED BY BANKRUPTCY, and of its justice and non-payment, is not sufficient to revive it. *Id.*
3. JURY ARE JUDGES WHETHER PROMISE TO PAY DEBT BARRED BY BANKRUPTCY was imported or intended by the language used by the debtor and the surrounding circumstances. *Id.*

BANKS AND BANKING.

1. BANKING CORPORATION ISSUING TIME PAPER IN VIOLATION OF STATUTE, IN FULFILLMENT OF CONTRACT OTHERWISE VALID, is alone the offender; the penalty does not attach to the other party to the transaction. *Tracy v. Talmage*, 132.
2. FREE BANKING ASSOCIATIONS, formed under the New York free banking law of 1838 (Laws 1838, p. 245), have power to carry on business only in the manner and to the extent authorized by the act; they cannot purchase stocks for the purpose of selling them again at a profit. *Id.*

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1. BONA FIDE PURCHASER OF LAND FOR VALUABLE CONSIDERATION WITHOUT NOTICE of prior unrecorded deeds who records his deed first is protected, though his grantor purchased with notice thereof. *Wood v. Chapin*, 62.
2. PURCHASER WITH NOTICE OF PRIOR UNRECORDED DEEDS IS PROTECTED by the recording act nevertheless, if he purchased from one who was so protected. *Id.*
3. PURCHASER OF LAND UNDER JUDICIAL PROCEEDING INSTITUTED BY HIMSELF for the recovery of his debt is a *bona fide* purchaser for a valuable consideration, within the recording acts, though the whole purchase price is applied upon the debt, and no new consideration is paid except the expenses of the proceedings. *Id.*
4. ALL CONVEYANCES IN CHAIN OF TITLE FROM FORMER OWNER need not be recorded in order to protect *bona fide* purchaser whose deed is first recorded against prior unrecorded conveyances from such owner. *Id.*
5. TO CONSTITUTE BONA FIDE PURCHASER WITHIN MEANING OF RECORDING ACT, the purchaser must, before he receives notice of the prior unrecorded deed, have advanced some new consideration, or relinquished some security for a pre-existing debt due to him; and the mere receiving a conveyance in payment of a pre-existing debt is not enough. *Id.*
6. PURCHASER OF EQUITABLE TITLE TAKES IT SUBJECT TO ALL EQUITIES, though he purchases *bona fide*, for a valuable consideration, and without notice thereof. *York v. McNutt*, 607.
7. ASSIGNEE OF BOND FOR TITLE TAKES IT SUBJECT TO DEFENSES available against the original vendee, notwithstanding he purchased for a valuable consideration, and without notice of such defenses. *Id.*

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BOUNDARIES.

1. PRESUMPTION IS THAT OWNERS OF LAND ON EACH SIDE OF STREET, ROAD, OR HIGHWAY GO TO CENTER of such boundary, and they have the exclusive right to the soil, subject to the right of passage in the public. *Paul v. Carver*, 413.
2. CONVEYANCE OF LAND BOUNDED BY PUBLIC STREET, DITCH, FRESH-WATER RIVER, OR HIGHWAY PASSES TITLE TO CENTER of such boundary; as it is regarded as a single line, and the thread of such boundary is the monument or abuttal. Monuments control measurements. *Id.*
3. IT WILL NEVER BE PRESUMED THAT GRANTOR, after parting with all his right and title to the adjoining land, intended to withhold his interest in a street, road, or highway, to the center of it. *Id.*
4. GRANTEE'S TITLE CANNOT BE LIMITED TO EDGE OF PUBLIC STREET, DITCH, HIGHWAY, OR FRESH-WATER RIVER, unless there is an express exception

in the deed to that effect, or some clear and unequivocal declaration, or certain and immemorial usage. *Id.*

5. ALTHOUGH MEASUREMENT OF DISTANCE SET FORTH IN CONVEYANCE BRINGS LINE ONLY TO SIDE of the street or highway, this is not sufficient to control the rule of law which carries the title to the center of such street or highway. *Id.*
6. CONVEYANCE REFERRING TO "DIVIDING LINE" WILL BE CONSTRUED TO MEAN REAL LINE, and not an imaginary one, and will constitute an express recognition of such line by the parties. *George v. Thomas*, 612.
7. SUIT TO HAVE DIVISION LINE RUN BETWEEN TWO TRACTS OF LAND may be maintained where the deed of one tract, which was granted out of a larger tract, does not ascertain the boundaries of the land conveyed, but merely gives a description by which they may be ascertained, and where the owner of the other tract will not permit the line to be run; such suit is in the nature of a suit for specific performance. *Id.*
8. SUIT CANNOT BE MAINTAINED TO HAVE DIVISION LINE RUN where such a line has been already run and marked by the parties. *Id.*
9. DIVISION LINE RUN BY PARTIES IN INTEREST CANNOT BE DISREGARDED because it cannot be found in its whole extent, or because it was not actually run through, if its two extremes can be found, and it can be traced for a part of the distance. *Id.*
10. LINES ACTUALLY MARKED IN RUNNING DIVISION LINE MUST BE ADHERED TO, though they vary from the course, and do not form a right line from corner to corner, especially after lapse of time and long-continued occupancy with reference to them. *Id.*
11. WHERE LINE HAS BEEN MARKED ONLY PART OF WAY, the boundary for the rest of the distance will be a direct line from the termination of the marked line to the point of intersection, or to the corner called for. *Id.*
12. DIVISION LINE WILL BE CONSIDERED CONTINUOUS LINE where it exists at its two extremities and for a principal part of the distance. *Id.*
13. RULE FOR DETERMINATION OF DIVISION LINE BETWEEN GRANTOR AND GRANTEE OF PART OF TRACT is the same whether the deed or conveyance refer for its boundaries to the marked lines or monuments, or they be afterwards marked and established by the parties. *Id.*
14. WHERE PARTIES HAVE AGREED UPON AND MARKED BOUNDARY LINE, and the possession is in accordance with it for such a length of time as may give title by disseisin, the line cannot be disturbed, although found to be erroneously established, unless there be clear proof that the possession was not adverse. *Id.*

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1. WAGONER IS COMMON CARRIER where he carries goods for hire for all persons indifferently. *Philleo v. Sanford*, 654.

2. COMMON CARRIER CARRYING GOODS IN COVERED WAGON IS LIABLE FOR INJURY BY RAIN, although guilty of no negligence, being regarded as an insurer against loss from any such cause. *Id.*
3. BURDEN IS ON COMMON CARRIER TO SHOW THAT LOSS IS WITHIN STIPULATED EXCEPTION from liability, and that there was no negligence. *Baker v. Brinson*, 548.
4. EXCEPTION OF "RUST AND BREAKAGE," IN BILL OF LADING, exempts the carrier from liability for such rust and breakage only as could not have been avoided by care and diligence. *Id.*
5. ONUS UPON CARRIER TO PROVE NO NEGLIGENCE, WHERE HE STIPULATES FOR NO LIABILITY for rust and breakage, and a stove is broken in the transit, is not discharged by merely proving that the stove was stored in a proper place, especially when another stove stored there was also broken. *Id.*
6. AS BETWEEN RAILROAD COMPANY AND PASSENGER, DUTY OF SAFE CONVEYANCE IS MEASURED by a severe rule arising out of the nature of the obligation, and a principle of public policy; and passengers undertake to run those risks only which cannot be avoided by the utmost degree of care and skill on the part of the carrier in the preparation and management of the means of conveyance. *Mad River etc. R. R. Co. v. Barber*, 312.
7. COMMON CARRIER WHO SELLS THROUGH-TICKETS TO PLACE BEYOND HIS OWN LINE, in pursuance to an agreement between him and proprietors of connecting lines that passengers might pay the whole fare at either end and receive through-tickets, is liable for damages to passengers hindered and detained on their journey through the fault of the proprietors of a connecting line, and it is immaterial whether or not the passengers knew of the agreement between the carriers. *Carter v. Peck*, 604.
8. RAILROAD COMPANY ACTING AS COMMON CARRIER OF ANIMALS is not liable for their dying or being injured from causes arising from their animal nature and propensities, and which diligent care could not have prevented; but is liable, in the absence of special agreement or proof of inevitable accident, for loss or damage which might have been avoided by use of care and foresight, whether due to conduct of the animals themselves or to incidents of the company business. *Clarke v. Rochester etc. R. R. Co.*, 205.
9. TITLE TO GOODS IN TRANSIT IS PRESUMED TO BE IN CONSIGNEE, and one carrier who receives them from another to be delivered to the consignee is not presumed to know that they are the property of the person who ships them. *Bingham v. Lamping*, 418.
10. CARRIER RECEIVING GOODS CANNOT HOLD THEM TO ANSWER ATTACHMENT at the suit of a creditor of the shipper, previously served upon him; nor is he liable for them if attached while he is in the faithful performance of his contract as a common carrier. *Id.*
11. ONE WHO IS BOTH CARRIER AND WAREHOUSEMAN IS LIABLE AS CARRIER for goods deposited in warehouse as a mere accessory to the carriage; that is, deposited for the purpose of being carried without further orders; and his responsibility as carrier begins from the time of the receipt of the goods. *Blossom v. Griffin*, 75.
12. RECEIPT GIVEN BY PARTIES WHO WERE CARRIERS AS WELL AS FORWARDERS stated that goods were received to be forwarded. The goods were burned in the warehouse before carriage commenced. *Hehl*, that the

signers were responsible as carriers, not as forwarders only. The receipt did not exclude evidence of the circumstances under which it was given, and of an antecedent parol agreement to carry plaintiff's goods generally, and these showed that the words "to be forwarded" were not used in a technical sense. *Id.*

COMMON LAW.

IN ADMINISTRATION OF CRIMINAL LAW IN TEXAS, COMMON LAW, where not modified by the constitution or statutes, furnishes the rule of decision, as well in matters of practice as principle; though a departure from the common-law system of pleading has caused a corresponding departure from the common-law practice in civil cases. *Hyde v. State*, 630.

CONSTITUTIONAL LAW.

1. LAWS AUTHORIZING CORPORATE AUTHORITIES OF CITIES AND VILLAGES TO LEVY SPECIAL ASSESSMENTS upon property particularly benefited, for the purpose of improving streets, are constitutional. *Hill v. Higdon*, 289.
2. SUM EXACTED AS SPECIAL ASSESSMENT UPON PROPERTY PECULIARLY BENEFITED by street improvement is not a taking of private property for public use, and infringes no constitutional provision providing for the inviolability of such right. *Id.*

CONTEMPT.

1. CONTEMPT OF COURT IS SPECIFIC CRIMINAL OFFENSE, and the power to punish it belongs to the court in which it was committed. No other court, not even the highest, can interfere with the exercise of this authority, either by writ of error, *mandamus*, or *habeas corpus*. *Williamson's Case*, 374.
2. FEDERAL COURTS HAVE POWER TO TRY AND PUNISH CRIME OF CONTEMPT, and state courts will not interfere with their sentences therefor on the writ of *habeas corpus*. Such judgments are conclusive. *Id.*
3. EVIDENCE UNDER WHICH OFFENDER WAS TRIED, FOUND GUILTY, AND SENTENCED FOR CONTEMPT of court cannot be re-examined on *habeas corpus* by another court, however innocent the petitioner may appear to be. *Id.*
4. RECORD OF CONVICTION FOR CONTEMPT IS AS DISTINCT from the matter under investigation when it was committed as an indictment for perjury is from the cause in which the false oath was taken. *Id.*
5. CONVICTION AND SENTENCE FOR CONTEMPT ARE NONE THE LESS CONCLUSIVE on *habeas corpus* before another tribunal because the contempt was committed while the offended court was investigating, or trying to investigate, a matter beyond its jurisdiction. *Id.*
6. CONVICTION OF CONTEMPT IS SEPARATE PROCEEDING, AND IS CONCLUSIVE OF EVERY FACT which might have been urged on the trial for contempt; and among others, want of jurisdiction to try the cause in which the contempt was committed. Such objection must be made on the trial for contempt; it is too late to make it after conviction. *Id.*
7. ON TRIAL FOR CONTEMPT, IT IS NO DEFENSE TO SHOW that the misconduct merely obstructed the progress of an investigation which the court would have been obliged in the end to dismiss for want of jurisdiction. *Id.*

See JUSTICES OF THE PEACE, 2, 3.

CONTRACTS.

1. RULE EXCLUDING PAROL EVIDENCE TO AFFECT WRITTEN CONTRACTS does not reject an antecedent parol agreement of a different character, and imposing a very different, but not inconsistent, obligation. *Blossom v. Griffin*, 75.
2. IN CONSTRUING WRITING, IT IS PROPER TO LOOK AT ALL SURROUNDING CIRCUMSTANCES, the pre-existing relation between the parties, and then to see what they mean when they speak. *Id.*
3. VERBAL AGREEMENT, TO HAVE EFFECT OF ALTERING TERMS OF PRIOR WRITTEN CONTRACT, must be supported by a new and valid consideration, or must have been so far acted upon that a refusal to carry it out would work a fraud on one of the parties. *Thurston v. Ludwig*, 328.
4. NO LEGAL PROTECTION IS GIVEN TO PROHIBITED CONTRACTS, prohibited trades, or prohibited things; but persons are never outlawed, and their lawful property is under the protection of the state, even when used improperly. *Mohney v. Cook*, 419.
5. CONTRACT NOT IN ITSELF IMMORAL NOR IN CONTRAVENTION OF ANY LAW, by which the state acquires a citizen, cannot be contrary to its policy. *Miller v. Roberts*, 688.
6. FALSE REPRESENTATIONS AS TO FUTURE EVENTS will vitiate a contract, where those events depend upon the acts of the party making the representations and form the inducement for the contract. *Henderson v. San Antonio etc. R. R. Co.*, 675.
7. FALSE REPRESENTATIONS NEED NOT BE MADE WITH INTENT TO DECEIVE or defraud in order to vitiate a contract; if made through carelessness, mistake, or ignorance, they will have the same effect. *Id.*
8. ACT EXTENDING TIME FOR COMPLETING RAILROAD DOES NOT AFFECT CONTRACT entered into with the railroad company, the essential inducement of which was an assurance that the road would be built within a certain time, and failure to complete it within that time discharges the other party to the contract, notwithstanding the extension of time. *Id.*
9. PLEADING—EVIDENCE.—In an action for refusing to furnish the necessary kiln and hop-house for preparing hops for market, under a contract to prepare a suitable and convenient kiln and dry-house, to be prepared and ready for use when the same should be required, evidence that the contractee directed the contractor not to build them, but to use the contractor's kiln and dry-house for the purpose, that the contractor did so, and paid for the use of the same, and that the contractee made no objections, but fully assented to the arrangement, is admissible under a plea by the contractor that he did prepare a suitable kiln and dry-house, ready for use when required; also that he did prepare the same according to the true intent and meaning of said contract, and to the full satisfaction of plaintiff. *Thompson v. Kilborne*, 742.
10. COMMON-LAW DISTINCTION BETWEEN JOINT AND JOINT AND SEVERAL CONTRACTS was always with regard to the remedy, and the discharge of one by taking action against the other is the peculiarity which the Pennsylvania statute takes away. *Miller v. Reed*, 459.

See PARENT AND CHILD, 3, 4; SALES.

CORPORATIONS.

1. POWERS GIVEN TO CORPORATION WHICH CANNOT BE EXERCISED without disregard of restrictions with which they are coupled cannot be exercised at all. *Commonwealth v. Erie etc. R. R. Co.*, 471.
2. CHARTER OF CORPORATION MUST BE CONSTRUED favorably to the public, and against the grantees. *Id.*
3. CORPORATION MAY DO THOSE ACTS ONLY WHICH IT IS AUTHORIZED TO DO BY ITS ACT OF INCORPORATION, and may exercise only such powers as are given in plain words, or by necessary implication, and all powers not given in this direct and unmistakable manner are withheld. *Id.*
4. CHARTER OF CORPORATION AUTHORIZING IT TO BUILD RAILROAD from borough of Erie, then bounded south by Twelfth street, is not complied with, where the borough is subsequently extended farther south, by a building of the road from a point within the enlarged borough, but some distance outside of the former borough line, the change of the borough lines not affecting the obligations of the corporations. *Id.*
5. CORPORATION WHOSE EXISTENCE IS LIMITED TO SIXTY YEARS MAY, WHEN GIVEN SUCH POWER BY ITS CHARTER, ACQUIRE AND CONVEY LAND IN FEE, and an equity of redemption in land so conveyed is subject to sale under execution. *Rives v. Dudley*, 231.
6. PROVISIO OR SAVING CLAUSE IN STATUTE IS NOT TO HAVE EFFECT where repugnant to the purview or body of the act; but this rule does not apply to acts constituting private corporations, for the proviso in such cases is to be taken as an essential condition of the compact between the public and the corporation. *Dugan v. Bridge Co.*, 464.
7. ACT OF INCORPORATION IS COMPACT BETWEEN PUBLIC AND CORPORATION, and the rights of the latter thereunder are only such as the very terms of the enactment confer, and any ambiguity therein must operate against the corporation and in favor of the public. *Id.*
8. CORPORATION CANNOT, ON GROUND OF PUBLIC INTEREST, CLAIM IMMUNITY FOR WRONGFUL ACTS or violations of its contracts, to the prejudice of others, any more than a natural person. *Henderson v. San Antonio etc. R. R. Co.*, 675.
9. STOCKHOLDER MAY SUE CORPORATION for any cause for which any other person might sue, being deemed a stranger to the artificial body created by the charter. *Id.*
10. RIGHTS AND FRANCHISES OF MUNICIPAL CORPORATIONS CAN NEVER BECOME VESTED RIGHTS AS AGAINST STATE. *Montpelier v. East Montpelier*, 748.
11. SO FAR AS PUBLIC AND MUNICIPAL FRANCHISES AND EXISTENCE OF MUNICIPAL CORPORATIONS ARE CONCERNED, the legislature may exercise over them exclusive control, and may constitutionally enlarge, restrain, and even destroy their municipal existence. This may be done although the municipality is trustee for a charity. *Id.*
12. LEGISLATURE MAY DIVIDE MUNICIPAL CORPORATION INTO TWO SEPARATE MUNICIPALITIES, and may also direct a division of the property of the original town, held under its original charter in its corporate and municipal capacity, and which was to be used for municipal purposes. *Id.*
13. ACT OF LEGISLATURE SEPARATING MUNICIPAL CORPORATION INTO TWO SEPARATE MUNICIPALITIES HAS NO EFFECT upon property held by the original city in trust for specific purposes mentioned in its charter. *Id.*

14. WHERE MUNICIPAL CORPORATION WAS TRUSTEE FOR ALL PERSONS RESIDING WITHIN ITS TERRITORY, of certain lands, their rents and profits, and was by the legislature divided into two separate municipalities, the trust survives to such inhabitants, residing within such territorial limits, and the original town having been destroyed, and no trustee being in existence, a court of equity will appoint one whose duty it will be to take charge of the trust property, and hold the same subject to the direction of the inhabitants of the original town. *Id.*
15. CITY CANNOT AUTHORIZE LAYING RAILROAD IN STREET, to be operated for private gain, without express statutory power. *Davis v. Mayor etc. of New York*, 186.
16. CITY COUNCIL CANNOT, BY ORDINANCE, MODIFY OR REPEAL an act whereby a borough is laid out, and enacting that the "streets, lanes, and alleys thereof" shall forever be and remain public highways. *Commonwealth v. Erie etc. R. R. Co.*, 471.

See AGENCY, 4-6; BANKS AND BANKING, 2; RAILROADS.

CO-TENANCY.

IF ONE JOINT OWNER OUSTS HIS CO-TENANT, LATTER MAY REGARD FORMER'S possession as his own and maintain partition, but if the ouster amounts to an effectual disseisin, they no longer hold the estate together, and partition cannot be maintained. *Brock v. Kustman*, 733.

See PARTITION.

COVENANTS.

See PLEADING AND PRACTICE, 14, 15.

CRIMINAL LAW.

1. IN INDICTMENT FOR BIGAMY, UNDER SECTION OF STATUTE WHICH RECITES that certain acts shall amount to that offense "except in the cases mentioned in the following section," the exceptions contained in such section need not be negatived. *State v. Abbey*, 754.
2. IN INDICTMENT FOR VIOLATION OF STATUTE TO WHICH THERE IS EXCEPTION IN ENACTING CLAUSE, the state must negative the exception, and state in the indictment that the defendant is not within it; but if there be an exception in a subsequent clause or subsequent section of the statute, it is a matter of defense, and is to be shown by the defendant as a defense. *Id.*
3. IF EXCEPTION IS SO INCORPORATED WITH AND BECOMES PART OF PENAL ENACTMENT as to constitute a part of the definition or description of the offense, an indictment for the violation of such statute must negative the exception. It is the nature of the exception, and not its location, which determines the question. *Id.*
4. MARRIAGE CERTIFICATE IS ADMISSIBLE IN EVIDENCE against a defendant charged with bigamy, not as proof of his marriage, but in connection with his previous declarations, in which he had stated that he was married, and supported his assertion by exhibiting this certificate. *Id.*
5. FELONIOUS INTENT AT TIME OF TAKING IS ESSENTIAL TO LARCENY; but where one obtains possession of an article merely to look at it, but without intending to steal, and then embezzles it, he is guilty of larceny. *Dignowitty v. State*, 670.

6. OBLIGOR IN BOND IS GUILTY OF LARCENY IN DESTROYING IT with intent to benefit himself, after having obtained possession of it on pretense of examining it, even though he did not then intend to destroy it, but conceived the design at the moment of the act of destruction. *Id.*
7. FELONIOUS INTENT IN LARCENY NEED NOT BE INTENT TO BENEFIT the offender pecuniarily; an intent to serve either himself or another, though not pecuniarily, would be sufficient. *Id.*
8. PARTICULAR DESCRIPTION OF THING STOLEN, IN INDICTMENT for larceny, is not necessary, but it is sufficient to describe it specifically by the name usually applied to it. *Id.*
9. INDICTMENT FOR LARCENY OF "CERTAIN INSTRUMENT OF WRITING containing evidence of an existing contract for the conveyance of real estate, to wit, a town lot in the city of A.," etc., of a specified value, the property of M. F., sufficiently describes the thing stolen. *Id.*
10. PROOF, IN LARCENY, OF GENERAL OR SPECIAL PROPERTY OF OWNER, alleged in the indictment, in the thing stolen, is sufficient to sustain a conviction; as in case of an indictment for stealing a bond, "the property of M. F.," where the proof is that the bond was made to M. F. and her husband, since deceased, leaving a child living. *Id.*
11. IT IS EXCUSABLE HOMICIDE TO TAKE LIFE OF ADVERSARY when "sorely pressed" and in danger of death or great bodily harm. *State v. Ingold*, 233.
12. COURT MUST SPECIFICALLY CHARGE JURY AS TO DEGREE OF CRIME COMMITTED. It is error to charge that the offense is, "at least," manslaughter. *Id.*

See ARREST; COMMON LAW; CONTEMPT, 1-4; DAMAGES, 1, 2.

CURTESY.

ACTUAL SEISIN BY WIFE DURING COVERTURE IS NOT NECESSARY to entitle husband to curtesy, in Ohio. *Lessee of Merritt v. Horne*, 298.

DAMAGES.

1. EXEMPLARY DAMAGES MAY BE AWARDED IN ACTIONS FOR ASSAULT AND BATTERY. *Rowe v. Moses*, 560.
2. PECUNIARY CIRCUMSTANCES OF DEFENDANT MAY BE CONSIDERED IN FIXING DAMAGES in an action for assault and battery. *Id.*
3. MEASURE OF DAMAGES IS CONTRACT PRICE, WITH INTEREST, IN ACTION BY VENDOR AGAINST VENDEE for failure to complete his contract for the purchase of land, the vendor having made and tendered a deed to the vendee. *Gerrard v. Dollar*, 271.

See EASEMENTS, 2; JUDGMENTS, 1; SLANDER.

DEBTOR AND CREDITOR.

1. DEBTOR WILL NOT BE ALLOWED TO SECURE ADVANTAGE AT EXPENSE OF CREDITORS as price of preferring one of them. *Pringle v. Rhame*, 569.
2. SALE OF CHATTEL IN PAYMENT OF ANTECEDENT DEBT, WHERE DEBTOR RETAINS POSSESSION and use of property, is not fraudulent as to creditors, if the debtor makes a *bona fide* contract to pay hire. *Id.*

3. ALLOWING CHATTEL PURCHASED AT SHERIFF'S SALE TO REMAIN IN POSSESSION OF DEBTOR is not fraudulent as to creditors, when the purchaser was not a creditor, and purchased *bona fide*. *Garrett v. Rhame*, 557.
- See FRAUDULENT CONVEYANCES; PARTNERSHIP; TRUSTS AND TRUSTEES, 22.

DEDICATION.

1. DEDICATION BY OWNER OF PARTICULAR ESTATE WILL NOT BIND THOSE IN REMAINDER OR REVERSION. *Rives v. Dudley*, 231.
2. OWNER IS ESTOPPED FROM RESUMING PRIVATE RIGHTS OF PROPERTY OVER HIS LAND WHEN BY HIS ACT HE SIGNIFIES HIS INTENTION to appropriate land to the use of the public, and persons in consequence of this act purchase property or build houses with reference to its being used by the public. Such dedication takes effect immediately; but this rule does not apply where there has been no appropriation by the owner to the public use. *Id.*
3. DEDICATION TO PUBLIC USE DOES NOT OPERATE AS GRANT, BUT AS ESTOPPEL IN PAIS. *Id.*

DEEDS.

1. POLICY OF THIS COUNTRY FAVORS FREE ALIENATION of property. *Critbins v. Markwood*, 775.
2. DEED IS TO BE CONSTRUED MOST FAVORABLY TOWARD GRANTEE. *Commonwealth v. Erie etc. R. R. Co.*, 471.
3. DELIVERY OF DEED IS FINAL ACT OF ITS EXECUTION. *Newlin v. Osborne*, 269.
4. DATE OF DEED PROVED TO HAVE BEEN DELIVERED AT SAME TIME IS PRIMA FACIE PROOF THAT IT WAS EXECUTED ON THAT DAY; but when rebutted, its execution must be referred to the time when it is proved that the grantor parted with the possession for the purpose of giving effect to it. *Id.*
5. ACKNOWLEDGMENT OF DEED FOR PURPOSE OF REGISTRATION IS DELIVERY. *Id.*
6. DECLARATIONS OF GRANTOR ANTERIOR TO DELIVERY OF DEED ARE EVIDENCE AGAINST HIM and those claiming under him. *Id.*
7. DEED IS VALID BETWEEN PARTIES WITHOUT ATTESTATION OR ACKNOWLEDGMENT. *Wood v. Chapin*, 62.
8. TO CONSTITUTE GOOD CONVEYANCE BY WAY OF BARGAIN AND SALE, there must be a valuable consideration expressed in the deed, or proved independently of it; and where it is expressed, it is conclusive. *Per Denio, C. J. Id.*
9. RECITAL IN DEED ACKNOWLEDGING PAYMENT OF CONSIDERATION MONEY is presumptive evidence that the grantee is a purchaser for a valuable consideration, under the recording acts. *Id.*
10. WHERE DEED IS MADE TO CERTAIN PERSONS, DESCRIBED THEREIN AS "HEIRS AND LEGAL REPRESENTATIVES of John Soye, deceased," it is *prima facie* evidence that the consideration moved from said deceased, and that the conveyance was made to such grantees, not in their own right, but in their representative capacity; as a consequence, such property is subject to the payment of the debts of deceased. *Soye v. McCallister*, 689.
11. UTTERLY VOID AGREEMENT BY ONE PERSON TO CONVEY CERTAIN LAND TO ANOTHER, or his heirs, may be made use of to ascertain the intention of

- the former, who has made a deed of such land to such heirs, and to show that the land was conveyed to them as such heirs of deceased; that it was property of his estate, and liable for the payment of his debts. *Id.*
12. GRANTEE CANNOT SET UP RIGHTS OF MARRIED WOMEN AND MINORS from whom he purchases in order to maintain rights in himself which his vendors neither asserted nor pretended to convey to him. *George v. Thomas*, 612.
 13. WANT OF SEAL IN SHERIFF'S DEED DULY ACKNOWLEDGED IS FATAL DEFECT, where the deed, in order to be valid, is required to be signed, sealed, and acknowledged; and the addition of a seal many years afterwards, without another acknowledgment, will not make it available, in a court of law, to protect the purchaser, in an action of ejectment brought by an infant or one who has succeeded to her estate. *Lessee of Merritt v. Horne*, 298.
 14. RECORD OF DEED IS CONSTRUCTIVE NOTICE TO THOSE ONLY WHO CLAIM through or under the grantor by whom the deed was executed. *Blake v. Graham*, 360.
 15. PURCHASER OF REAL ESTATE IS NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE of prior equities which are disclosed in a deed duly recorded from the executor of the person from whose heirs he purchases. *Id.*
- See BONA FIDE PURCHASERS, 1, 2; BOUNDARIES; EJECTMENT, 1, 2; EQUITY, 6-8; EXECUTIONS, 5; MARRIED WOMEN, 1, 3-8; TRUSTS AND TRUSTEES.

DOWER.

1. DOWER IS, WHILE INCHOATE, SUBJECT TO SUCH MODIFICATIONS and qualifications as the legislature may see proper, for reasons of public policy, to impose. *Weaver v. Gregg*, 355.
2. WIFE'S INCHOATE RIGHT OF DOWER IN LANDS HELD BY HER HUSBAND AS CO-TENANT is divested by a sale thereof, under the Ohio act providing for the partition of real estate, and the entire estate passes to the purchaser at such sale. *Id.*

EASEMENTS.

1. THERE IS INCIDENT TO LAND, IN ITS NATURAL CONDITION, RIGHT TO SUPPORT FROM ADJOINING LAND; and if the land sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. *McGuire v. Grant*, 49.
2. MEASURE OF DAMAGES IN ACTION FOR CAUSING LAND TO SINK OR FALL AWAY in consequence of the removal of its support by adjoining land, is the diminution in the value of the land or lot, and not what it will cost to restore the lot to its former condition, or to build a wall to support it. This applies to land not subject to artificial pressure, as where no buildings stand thereon. *Id.*
3. OWNER CANNOT RECOVER FOR INJURY DONE TO BUILDING STANDING ON BOUNDARY LINE OF LOT, which tumbles down by reason of excavations made upon adjoining lot, where there has been no improper motive or carelessness in the execution of the work. The loss is *damnum absq̄e injuria*. *Id.*
4. DEFENDANT IS PERSONALLY RESPONSIBLE FOR HIS INJURIOUS ACT IN REMOVING NATURAL SUPPORT OF LAND not subjected to artificial pressure, or not having buildings thereon, if such act were done by himself, or by his direction, or by persons in his employ. *Id.*

5. USER OF EASEMENT FOR EIGHT YEARS WILL NOT RAISE PRESUMPTION OF GRANT. *Rives v. Dudley*, 231.

See SERVITUDES; WAYS.

EJECTMENT.

1. SHERIFF'S DEED IS COMPETENT EVIDENCE FOR DEFENDANT IN EJECTMENT, although acknowledged after suit was brought, if the sale was prior to the commencement of the action. *Smith v. Grim*, 400.
2. TENANT OF SHERIFF'S VENDEE, TAKING POSSESSION OF PREMISES BETWEEN DATE OF SALE and acknowledgment of deed, cannot be treated as an intruder, where the true owner comes in and defends his possession. *Id.*

EMINENT DOMAIN.

SUPREME LEGISLATIVE POWER OF STATE MAY AUTHORIZE BUILDING OF RAILROAD ON a street or other public highway, but corporation cannot appropriate such street or highway for such a purpose unless authorized to do so by the sovereign power of the state. *Commonwealth v. Erie etc. R. R. Co.*, 471.

EQUITY.

1. EQUITY WILL RESCIND CONTRACT FOR SALE OF LAND FOR MUTUAL MISTAKE AS TO QUANTITY of land which the boundaries given in the contract contained, where the deficiency is material, upon the application of the purchaser, if the mistake is clearly proved. *Belknap v. Sealey*, 120.
2. "MORE OR LESS," used in the contract in connection with the statement of the quantity, will not prevent granting such relief. *Id.*
3. PARTY CANNOT DISPUTE VALIDITY OF PURCHASE where, having the title to land which is offered for sale, and knowing his title, he stands by and encourages or does not forbid the sale, and thereby induces another to purchase under the supposition that he is getting a good title. Such purchaser is entitled to equitable relief in perfecting his title. *Saunderson v. Ballance*, 218.
4. WHERE DONATIONS HAVE BEEN MADE BY CERTAIN CITIZENS OF COUNTY TO PROCURE COUNTY SEAT TO BE LOCATED IN CERTAIN PLACE, and the county seat is located there in consideration of such contributions, but afterwards removed, and the county, notwithstanding such removal, claims the property and the right to use and dispose of it for other purposes than those for which the property was given, there is a clear moral obligation on the part of the county to either give up the property, or make compensation therefor, after the county seat is removed; and the donors in such a case may possibly invoke the aid of chancery. *Commissioners v. Hunt*, 303.
5. WHERE DONATIONS HAVE BEEN MADE BY CITIZENS OF COUNTY TO HAVE COUNTY SEAT LOCATED AT CERTAIN PLACE, and the county seat is there located in consideration of such contributions, but afterwards removed, and the county, notwithstanding such removal, claims the property and the right to use and dispose of it for other purposes than those for which the property was given, and the donors agree with the county commissioners to release the county from payment of interest on their claims if it will pay the amount actually contributed, the claims of the donors are

of that kind of doubtful character in equity which will raise a sufficient consideration for a compromise; and a court ought not to interfere by injunction to save the county from the payment of a demand having the sanctions of moral obligation. *Id.*

6. BILL TO REMOVE CLOUD ON TITLE WILL NOT LIE WHEN INSTRUMENT COMPLAINED OF AS CLOUD IS VOID on its face, or is void for omission of preliminary proceedings which any one claiming under it would be required to prove. *Scott v. Onderdonk*, 106.
7. BILL TO AVOID CONVEYANCE AS CLOUD LIES WHERE STATUTE DECLARES IT PRESUMPTIVE EVIDENCE of the regularity of preliminary proceedings, if the proper preliminary proceedings were not in fact had, as in case of a sale for a municipal assessment for a public improvement. *Id.*
8. BILL LIES TO ENJOIN CONVEYANCE WHICH WOULD BE CLOUD ON TITLE after an invalid sale for a municipal assessment, and the issuance of a certificate of sale. *Id.*
9. EQUITY WILL ENJOIN PLAINTIFF FROM DISMISSING ACTION AT LAW instituted in the name of one for his *cestuis que trust*; but the necessity for injunction does not exist when the right is an equitable one. *Falkner v. Streater*, 230.
10. EQUITY WILL NOT PREVENT PARTY FROM DISMISSING HIS OWN SUIT, instituted to establish a second equity. *Id.*
11. CLAIM OF EQUITABLE TITLE TO LAND BY PAROL GIFT is repugnant to and inconsistent with a claim of equitable title to the same land arising from the payment of purchase money, and a defense setting up both such titles will be rejected. *Cox v. Cox*, 432.
12. EQUITY DOES NOT LEND ITS AID TO EXPERIMENTS ON LEGAL TITLES in favor of those who can present no distinct and consistent claim. *Id.*
13. POSSESSION OF LAND BY SON with legal title in his father does not tend to prove an equitable title in the son, either by reason of a parol gift or payment of purchase money. *Id.*

See BONA FIDE PURCHASERS; PARTNERSHIP, 1, 13, 15-17; REVERSIONS; SPECIFIC PERFORMANCE.

ESTATES OF DECEDENTS.

1. WHERE HUSBAND AND WIFE BOTH DIE ABOUT SAME TIME, owing only community debts, there is no necessity for two administrations upon the same property to pay debts for which such property must have been equally liable in the hands of an administrator of either or both of said decedents. *Soye v. McCallister*, 689.
2. IT HAS NEVER BEEN AUTHORITATIVELY DECIDED THAT WRITTEN PETITION WAS NECESSARY TO GIVE PROBATE COURT jurisdiction to order a sale of the property of a deceased person. It seems that its absence would not defeat the jurisdiction of the probate court to order a sale of such property, nor affect the title of a purchaser thereof, who was not bound to look beyond the judgment of a court of competent jurisdiction. *Alexander's Heirs v. Maverick*, 693.
3. THAT ORDER FOR SALE OF REAL ESTATE HAD BEEN MADE WILL BE PRESUMED FROM CIRCUMSTANCES, in the absence of record proof thereof. So also will be the regularity of the proceedings of the administrator thereunder. *Doolittle v. Holton*, 745.

4. WHERE PROBATE COURT GRANTS ORDER OF SALE OF REAL ESTATE, AND SALE IS MADE THEREUNDER, THIS IS SUFFICIENT ground from which to presume the necessity for the sale, and the court would scarcely allow an inquiry into the foundation of the order. This is a matter within the exclusive jurisdiction of the court, and unless the order showed upon its face that it was made for some other purpose than the payment of debts, or that other means of paying them existed, the court will not allow the jurisdiction to be defeated by proof out of the record. All deficiencies in the recitals of the order will be supplied by intendment. *Id.*

See EXECUTORS AND ADMINISTRATORS; WILLS.

ESTOPPEL.

See DEDICATION, 2, 3; JURISDICTION, 3.

EVIDENCE.

1. PAROL EVIDENCE OF ORAL NEGOTIATIONS LEADING TO WRITTEN INSTRUMENT is incompetent to influence its construction. *Blossom v. Griffin*, 75.
2. OFFICIAL CHARACTER OF JUSTICE OF PEACE OR OF MINISTER OF GOSPEL IS ESTABLISHED *prima facie* by proof that for several years previous, as well as at the time in question, he had been and was in discharge of the duties of such positions respectively, and generally reputed to be such in the vicinity where they lived. *State v. Abbey*, 754.
3. STATUTE-BOOKS OF SISTER STATE, PURPORTING TO BE PUBLISHED UNDER ITS AUTHORITY, are admissible and competent proof of its statute law. *Id.*
4. DECLARATIONS OF PUBLIC SURVEYOR WHILE MAKING SURVEY, respecting what he was doing, for whom, and why, are admissible as part of the *res gestæ*. *George v. Thomas*, 612.
5. HEARSAY EVIDENCE IS ADMISSIBLE TO ESTABLISH OLD SURVEYS AND BOUNDARY LINES. *Id.*

See CONTRACTS, 1, 9; DEEDS, 6, 9; EJECTMENT, 1; GIFTS; PARDONS; STATUTE OF FRAUDS.

EXECUTIONS.

1. PLAINTIFF HAVING JUDGMENT RIPE FOR EXECUTION HAS VESTED RIGHT TO SUCH PROCESS, with all the legal incidents thereof, of which he cannot be deprived by a judge's order at chambers, and made without notice or hearing. *Irons v. McQueen*, 456.
2. JUDGE MAY STAY EXECUTION UPON SHOWING OF GOOD AND SUFFICIENT GROUNDS, but this should be with a stipulation that the lien of the execution be preserved. *Id.*
3. JUDGE HAS NO POWER TO ORDER EXECUTION RETURNABLE BEFORE DAY NAMED IN WRIT, and such order is void for want of jurisdiction, and if the order is made, such execution, on redelivery to the sheriff and rescission of the order, is entitled to priority over others issued subsequent to them, and before the order was made. *Id.*
4. JUSTICE OF PEACE ISSUING EXECUTION ON JUDGMENT WITHIN TIME ALLOWED FOR APPEAL must revoke the execution if the appeal is afterwards taken. *O'Donnell v. Mullin*, 458.

5. IN SALE OF PROPERTY UNDER PARTITION ACT OF 1820, 2 CHASE'S STATUTES, 1162, DEED OF CONVEYANCE from the sheriff, duly executed, was made necessary to a complete execution of the power of sale, and indispensable to invest the purchaser with the legal title. And it must have been signed and sealed by the sheriff in the presence of witnesses; and such signing and sealing acknowledged by him in open court. *Lessee of Merritt v. Horne*, 298.

See PARTITION, 7.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATION OF DECEDENT'S ESTATE RESEMBLES OFFICE; but if it be not an office, it is strictly a trust, and as such is not to be purchased for a price which creates in the trustee an interest adverse to that of the *cestui que trust*. *Bowers v. Bowers*, 398.
2. CONTRACT TO PURCHASE OFFICE OF ADMINISTRATOR, from one who has a lawful right to such trust, is against public policy and void. The law will not support such a consideration for an agreement. *Id.*
3. ADMINISTRATORS SUING TO RECOVER PROPERTY OF THEIR INTESTATE MUST BRING ACTION IN HIS NAME, though he was a lunatic at the time that the cause of action accrued. *Green v. Kornegay*, 261.
4. EXECUTOR CANNOT, AS EXECUTOR MERELY, CONVEY LANDS IN ANOTHER STATE, but may do so in virtue of a power given in the will; and in so doing, he acts as donee of a power, and not under an authority conferred by the surrogate. *Newton v. Bronson*, 89.
5. EXECUTOR CANNOT DELEGATE TO AGENT DISCRETIONARY POWER TO SELL LANDS. *Id.*
6. CONTRACT FOR SALE OF LAND OF ESTATE MADE BY ANOTHER THAN EXECUTOR, who has power to sell lands, is made valid when the executor ratifies it, with full knowledge of the facts, since in ratifying he exercises the discretionary powers of his personal trust. *Id.*
7. JURISDICTION TO GRANT LETTERS OF ADMINISTRATION BY PROBATE COURT CANNOT BE COLLATERALLY ATTACKED. *Abbott v. Coburn*, 735.
8. DISCHARGE BY ADMINISTRATOR APPOINTED IN VERMONT of debtors who owed his intestate at the place of his death in another state, or of one who held money belonging to the intestate at the place of his domicile beyond this state, does not discharge them from their debts, or relieve them from liability to a suit by an administrator at either of said places, to recover the amount of said debts. *Id.*
9. ACCORDING TO LAW OF VERMONT, NO ONE BUT ADMINISTRATOR APPOINTED IN STATE in which intestate's debtors resided at the time of his death can collect such debts, or release them, or properly administer them. It is doubtful, in this state, if remitting such debts to the administrator of the place of the domicile of deceased would discharge them. *Id.*
10. ADMINISTRATOR APPOINTED IN VERMONT UPON ESTATE OF PERSON WHO DID NOT RESIDE in this state cannot maintain an action to collect a debt due to said deceased, or money belonging to his estate in the hands of a person who does not reside in said state. The same can only be collected by an administrator appointed at the place of residence of the debtor of the intestate. *Id.*
11. ENTRY IN MINUTES OF PROBATE COURT, THAT ADMINISTRATOR'S FINAL ACCOUNT BE ADMITTED AND FILED, and he discharged upon paying costs,

does not amount to a final settlement and discharge. Consequently, where the authority of such an administrator continues to be recognized by the probate court, the order disregarded by all parties, and the administration proceeded with, an order of sale made after such entry and order is not void as having been made after the administrator's authority had ceased. *Alexander's Heirs v. Maverick*, 693.

12. STATUTE PROVIDING THAT ADMINISTRATOR SHALL NOT BE REQUIRED TO SELL PROPERTY of estate, etc., except upon petition of one of the persons therein mentioned, does not prevent or prohibit him from applying for and obtaining an order for the sale of such property, when necessary for the payment of debts or the settlement of the estate. *Id.*
13. VALIDITY OF SALE BY ADMINISTRATOR IS NOT AFFECTED BY FACT THAT RECORD DOES NOT SHOW PETITION for an order therefor. Probate courts are courts of general jurisdiction, and all presumptions are in favor of the validity of their proceedings. The purchaser at such sale was not required to go behind the order therefor. The record must affirmatively show that no petition was made. *Id.*
14. ABSENCE IN RECORD OF ANY EVIDENCE OF EXTENSION BY COURT OF TERM OF ADMINISTRATION does not invalidate the title of a purchaser who acquired title through him after the extension of his term. *Soye v. McCallister*, 689.

See ESTATES OF DECEDENTS, 3; FIXTURES, 3; WILLS.

FENCES.

See STATUTES, 2; TRESPASS.

FIXTURES.

1. OWNER OF LAND IS ENTITLED TO FIXTURE ERECTED THEREON BY ANOTHER, and a conveyance of the land by the owner conveys the fixture. *Rives v. Dudley*, 231.
2. GAS CHANDELIERS AND PENDENT GAS-BURNER ATTACHED BY SCREWS TO SMALL PIPE that conveys gas into dwelling-house, and which could be detached without any escape of gas or injury to the pipe or any part of the building, do not pass under a conveyance of the freehold made upon a sale to foreclose a mortgage thereon, and the same may be sold by the sheriff under executions against the mortgagor. *Montague v. Dent*, 572.
3. RULE RESPECTING FIXTURES IS SAME BETWEEN HEIR AND EXECUTOR, vendor and vendee, and mortgagor and mortgagee. *Id.*

FORGERY.

FORGERY AVOIDS INSTRUMENT, BUT TO CONSTITUTE ALTERATION OF INSTRUMENT FORGERY, it must have been fraudulent and to the prejudice of another. *Miller v. Reed*, 459.

FRAUD.

WHAT CONSTITUTES FRAUD IS QUESTION OF LAW. *Jessup v. Johnston*, 243.

See AGENCY, 4-6; CONTRACTS, 6, 7; DEBTOR AND CREDITOR, 2, 3; FRAUDULENT CONVEYANCES; INFANCY, 1; SALES, 2-5, 9.

FRAUDULENT CONVEYANCES.

1. OWNER'S FRAUDULENT CONVEYANCE OF LAND IS GOOD AS AGAINST HIM AND HIS HEIRS, and bad only as against creditors. *Smith v. Grim*, 400.
2. IF OWNER CONVEYS LAND IN FRAUD OF HIS CREDITORS, AND DIES, HIS HEIRS ARE NOT NECESSARY PARTIES to a judgment against his personal representatives, in order to charge the land with decedent's debts. *Id.*
3. CREDITOR CAN TAKE ADVANTAGE OF VOLUNTARY AND FRAUDULENT DEED OF TRUST only by reducing his debt to judgment and seizing the property under execution. *Green v. Kornegay*, 261.
4. DEED OF TRUST IS VOID AS AGAINST CREDITORS which allows the debtor to retain possession of goods for more than a year, and such possession is unexplained. *Grimsley v. Hooker*, 227.
5. CREDITOR, IN ORDER TO REACH PROPERTY CONVEYED BY FRAUDULENT TRUST DEED, VOID AS TO HIM, must get possession of the property by obtaining judgment and having it seized under execution. *Id.*
6. CREDITOR CANNOT REACH PROPERTY CONVEYED BY FRAUDULENT TRUST DEED, void as to him, by taking a deed from the debtor. *Id.*
7. CREDITORS CAN HOLD TRUSTEE RESPONSIBLE FOR VALUE OF PROPERTY SOLD, where they have reduced their debts to judgment, but before execution can issue thereon the trustee in a fraudulent deed of trust sells the property upon which the levy would have been made. *Id.*
8. CONVEYANCE BY FATHER, OVERWHELMED WITH DEBTS, TO SON, OF NEGROES AND PROPERTY WORTH LARGE SUM, in consideration that son will discharge debts amounting to two thirds of that sum only, raises a presumption of fraud which, if not rebutted, avoids the conveyance as to creditors, and it is the duty of the court to so instruct the jury. *Jessup v. Johnston*, 243.

GIFTS.

THAT IMPROVEMENTS WERE MADE BY SON ON LAND of which his father holds the legal title is not evidence of a gift of the land. *Cox v. Cox*, 432.
See EQUITY, 11, 13; PARENT AND CHILD, 3, 4.

GUARDIAN AND WARD.

1. CONDITION IN GUARDIAN'S BOND NOT CONFORMING TO STATUTE, BUT TO OLD FORM adopted under a prior statute, and long continued in use through the inadvertance of the justices, should not, it seems, be hastily pronounced invalid. *Pratt v. Wright*, 767.
2. STATUTORY BONDS SUPERADDING CONDITIONS CONTRARY TO STATUTE, or not required by it, to those which are required, are void as to the former, but valid as to the latter, unless made wholly void by the statute, expressly or by necessary implication. *Id.*
3. GUARDIAN'S BOND SUPERADDING ONEROUS CONDITION NOT REQUIRED BY STATUTE, nor appropriate to the nature of the office, to indemnify the justices, etc., is nevertheless valid as to those conditions contained in it which are within the statute. *Id.*
4. GUARDIAN'S BOND OMITTING MATERIAL PART OF STATUTORY CONDITION is valid as to what remains. *Id.*
5. CONDITION OF GUARDIAN'S BOND NEED ONLY BE VALID TO EXTENT OF BREACH assigned to sustain an action thereon. *Id.*

6. FAILURE TO RECITE GUARDIAN'S APPOINTMENT IN CONDITION OF BOND filed by him does not vitiate it. *Id.*
7. COURT OF EQUITY HAS JURISDICTION TO COMPEL NON-RESIDENT GUARDIAN AND SURETIES TO ACCOUNT for a balance due his ward. *Id.*
8. GUARDIAN OF IDIOT OR LUNATIC CANNOT EXCEED ANNUAL INCOME OF HIS WARD'S ESTATE, in expenditures for and on account of his ward, without the permission of the court. *Patton v. Thompson*, 222.
9. GUARDIAN OF INFANT WAS AUTHORIZED TO APPEAR FOR HIS WARD and consent that partition should be made, under the partition act of 1820, 2 Chase's Statutes, 1162. *Lessee of Merritt v. Horne*, 298.

See JURISDICTION, 2.

HABEAS CORPUS.

1. WRIT OF HABEAS CORPUS WILL BE GRANTED upon *prima facie* case showing that petitioner is entitled to discharge or bail. It issues upon probable cause for discharge. *Williamson's Case*, 374.
2. WRIT OF HABEAS CORPUS WILL BE DENIED when it appears upon the petition that applicant is legally confined, and must therefore be remanded. *Id.*
3. WRIT OF HABEAS CORPUS WILL BE DENIED to one who admits that he is in legal custody for an offense not bailable, such as contempt, etc. *Id.*
4. WRIT OF HABEAS CORPUS IS LIKE WRIT OF ERROR, which the court or judge is bound to allow if there be reason to suppose that an error has been committed, and equally bound to refuse if it be clear that the judgment must be affirmed. But it is not a writ of error. *Id.*
5. ALLOWANCE OF HABEAS CORPUS BY COURT OR JUDGE IS JUDICIAL ACT, and not a ministerial one. This is true both at common law and under statutes imposing a penalty for refusal of the writ. *Id.*
6. HABEAS CORPUS IS SOMETIMES USED TO OBTAIN CUSTODY OF CHILDREN, but in such cases it proceeds upon the principle that the children are restrained of their liberty who are in a custody disapproved by their lawful guardians. *Id.*
7. POSSESSION OF APPRENTICE, AS SUCH, cannot, as a general rule, be recovered on *habeas corpus*. *Id.*
8. SLAVE CANNOT BE RESTORED TO HIS MASTER ON HABEAS CORPUS. No court is justified in issuing the writ for such a purpose. It was intended to secure the liberty of the subject, not to try the rights of property. *Id.*
9. HABEAS CORPUS IS NOT AVAILABLE REMEDY TO RESTORE TO MASTER HIS APPRENTICE when illegally detained from him. The object of the writ is not to enable persons to assert a right to property, or to the services of another, but to protect the liberty of the subject. *Lea v. White*, 599.
10. APPEAL FROM DECISION OF CIRCUIT COURT DISMISSING WRIT OF HABEAS CORPUS WILL NOT BE ENTERTAINED by the supreme court of Tennessee. *Id.*
11. SENTENCE FOR INDEFINITE TIME, EVEN IF ERRONEOUS, CANNOT BE REVISED ON HABEAS CORPUS. This writ was not intended to provide a remedy against the unjust judgments or sentences of the higher courts; and when it is asked for such a purpose, it ought to be refused; unless, possibly, when it is asked from a court that may officially revise and correct the proceedings. *Williamson's Case*, 374.

See CONTEMPT, 1-3, 5; JUDGMENTS, 5; PROCESS, 1.

HIGHWAYS.

See BOUNDARIES, 1-5; CORPORATIONS, 16, 17; INJUNCTIONS.

HOMESTEADS.

1. HOMESTEAD IS NOT LOST BY DEATH OF WIFE OF OWNER, so long as he continues to make it his residence with his servants and family if he have any, or without them if he have none. *Taylor v. Boulware*, 642.
2. HOMESTEAD IS NOT ABANDONED BY OWNER'S ABSENCE for six or seven months without any intent to change his residence, leaving his family and servants upon the premises. *Id.*
3. EXTENDING CORPORATE LIMITS OF TOWN OVER HOMESTEAD by act of the legislature, without any act of the corporation extending the plan of the town thereto, by providing for laying out streets, or the like, will not affect its character as a homestead, under the Texas constitution. *Id.*
4. LAND WITHIN TOWN IS NOT TOWN LOT UNTIL STREETS ARE EXTENDED so as to include it in the plan of the town. *Id.*
5. MORTGAGE OF HOMESTEAD BY HUSBAND AND WIFE, TO BE VALID, must be conditioned with a power of sale by the mortgagee upon default of payment; and without this condition, her assent to the mortgage is without any effect, and neither adds to nor diminishes the force and effect of the mortgage by the husband. *Stewart v. Mackey*, 609.
6. MORTGAGE OF HOMESTEAD BY HUSBAND HAS FORCE AS LIEN as soon as property mortgaged is abandoned and another homestead is acquired. *Id.*
7. THERE IS SUFFICIENT ABANDONMENT AND CHANGE OF HOMESTEAD to render mortgage of homestead by husband effectual, where the husband two years previously ceased to occupy the mortgaged property as a homestead, and since then occupied his present residence as a homestead, which is different from the property mortgaged, and where no question is raised as to the rights of the wife. *Id.*
8. MORTGAGE BY HUSBAND OF HOMESTEAD IS NOT INHIBITED BY CONSTITUTIONAL PROVISION that husband may not alienate homestead unless by consent of the wife, but the mortgagee will take subject to the contingency that the homestead may not be changed, or that the wife may not assent, and that in the mean time his claim may be barred by the statute of limitations. *Id.*

HOMICIDE.

See CRIMINAL LAW, 11; JURY AND JURORS.

HUSBAND AND WIFE.

1. HUSBAND IS COMPETENT TO REPRESENT WIFE IN MATTER OF RUNNING BOUNDARY LINE, where it is done fairly and honestly, and she acquiesces in it, *semble*. *George v. Thomas*, 612.
2. CONVEYANCE TO HUSBAND AND WIFE AND THEIR HEIRS AND ASSIGNS created such an estate as upon the husband's death would vest in the widow as survivor, in Pennsylvania, before the act of 1848, and the wife had, therefore, a right to mortgage the property, which would not be restricted by a provision in her husband's will that it be sold for the payment of debts, nor would her mortgagee be bound to examine the will as to question of title. *Martin v. Jackson*, 489.
3. WHERE WIFE PURCHASES SET OF MINERAL TEETH, AND HER HUSBAND PERMITS HER TO KEEP THEM after he discovers that she has made the pur-

chase, and does not repudiate the contract, this raises an implied contract on his part to pay for them what they are reasonably worth. *Gilman v. Andrus*, 713.

4. WIFE, IN HUSBAND'S ABSENCE, HAS IMPLIED AUTHORITY to take care of the community property, and to make contracts respecting it for her own support, where no one else is left in charge of the property. *Cheek v. Bellows*, 686.
5. LEASE BY WIFE OF FUGITIVE FROM JUSTICE who has fled the state, of a hotel which is the joint property of the husband and wife, given for one year for a full consideration, is valid and binding, especially where she is destitute of means, and the rent is necessary for her support. *Id.*
6. HUSBAND'S MARITAL RIGHTS CANNOT ATTACH TO SLAVES belonging to a estate, of which his wife is a distributee, until division of the slaves. *Harris v. Taylor*, 576.
7. HUSBAND'S CREDITORS CANNOT LAY HOLD OF WIFE'S SLAVES FOR SATISFACTION OF THEIR DEBTS until the husband's marital right is complete by a reduction of the slaves into possession, or what is equivalent thereto. *Id.*

See HOMESTEADS; TRUSTS AND TRUSTEES, 10-19.

INDEMNITY.

See ATTORNEY AND CLIENT, 4-6.

INFANCY.

1. TRANSFER OF CHATTEL BY PURCHASER TO INFANT SON OF DEBTOR, upon debtor's refunding purchase money and interest to such purchaser, who, as he was not a creditor, and purchased *bona fide*, acquired title to the property at a sheriff's sale thereof as the property of the debtor, notwithstanding he allowed the debtor to retain possession of it, is not fraudulent as to creditors, and does not subject the property to execution for the debtor's debts in the absence of proof of actual fraud; and the debtor's possession prior to the transfer is subject to the purchaser's title, and his subsequent possession will be intended to be that of a guardian. *Garrett v. Rhame*, 557.
2. REFUSAL OF LEAVE TO PLEAD INFANCY AFTER ANSWER TO MERITS, and when the parties are about to go to trial, is not error. *Moke v. Fellman*, 656.
3. TIMBER SOLD TO INFANT TO BE USED IN BUILDING HOUSE IS NOT NECESSARY for which the infant can be bound. *Freeman v. Bridger*, 258.
4. INFANT CANNOT BIND HIMSELF FOR NECESSARIES WHEN LIVING WITH PARENT OR GUARDIAN, unless it is shown that the parent or guardian was unable or unwilling to furnish him with necessaries. *Id.*
5. INFANT ACQUIESCING IN SETTLEMENT OF BOUNDARIES AFTER COMING OF AGE WILL BE BOUND BY IT, *semble*. *George v. Thomas*, 612.

See GUARDIAN AND WARD; PARENT AND CHILD.

INJUNCTIONS.

SUIT TO ENJOIN CONSTRUCTION OF RAILROAD ALONG CITY STREET cannot be maintained by one who does not own real property on the street, to which the proposed railroad will be specially injurious; that he is a

resident and tax-payer in the city does not give him a right of action. *Davis v. Mayor etc. of New York*, 186.

See NUISANCE, 3; INJUNCTIONS, 3.

INNS.

1. IN ACTION ON CASE ON "CUSTOM OF THE LAND," INNKEEPERS ARE TREATED AS INSURERS, and are liable without proof of negligence for the loss of goods or animals left in their charge by guests. *Neal v. Wilcox*, 286.
2. ACTION ON CASE ON CUSTOM IS RESTRICTED TO GUESTS, AS DISTINGUISHED FROM BOARDERS who sojourn at an inn on special contract. *Id.*
3. IN ACTION ON CASE ON CUSTOM, LIABILITY OF INNKEEPERS IS RESTRICTED TO SUCH GOODS OR ANIMALS as the guest has with him for the purposes of the journey. *Id.*
4. IF PERSON LEAVE AT INN PROPERTY WHICH INNKEEPER CAN DERIVE NO GAIN FROM KEEPING, it is termed "dead property," and if he goes away himself, and the property is stolen in his absence, he has no action against his host, for the reason that he was not a guest at the time. *McDaniels v. Robinson*, 720.
5. BY LEAVING HORSE WITH INNKEEPER AFTER GUEST HAS DEPARTED, RELATION OF INNKEEPER and guest is not continued so as to render the former liable as such for a sum of money left with him by the latter while stopping at his house. *Id.*

INSURANCE.

1. WIDOW MAY MAINTAIN ACTION ON POLICY OF INSURANCE EFFECTED FOR HER BENEFIT by her husband although there is an executor. *Myers v. Keystone Mut. L. Ins. Co.*, 462.
2. THOUGH INSURANCE POLICY EXPRESSLY REQUIRES COUNTERSIGNING BY AGENT OF COMPANY, where the intention to execute it is sufficiently plain it may be dispensed with. *Id.*
3. INSURANCE COMPANY IS NOT LIABLE ON POLICY, where its agent agreed with a person on terms of insurance, subject to ratification by the company, and the company issued a policy on different terms, forwarding the same through the agent to the insured, with a request for its return if he did not comply with its terms, which policy he retained, but without complying with its terms. *Id.*
4. BURDEN OF PROOF TO SHOW INSURANCE AVOIDED BY ALTERATION of the insured premises, whereby the risk is increased, contrary to a stipulation of the policy, is on the insurance company. *Padelford v. Providence M. F. L. Ins. Co.*, 496.
5. ALTERATION OF INSURED PREMISES BY "ACT OF PROPRIETORS," so as to avoid the insurance, within the terms of the charter of the insurance company, is an alteration by the owner himself, or authorized by him, or adopted as his before a loss accrues. *Id.*
6. ALTERATION OF INSURED PREMISES BY TENANT IS NOT ALTERATION BY "PROPRIETOR," within the meaning of the prohibition in the charter of the insurance company, unless the proprietor authorized or adopted it. *Id.*
7. JURY ARE JUDGES WHETHER "PROPRIETOR" AUTHORIZED ALTERATION OF INSURED PREMISES, within the prohibition of the charter of the insurance company, and must determine the same from all the surrounding circumstances, where the alteration was made by a tenant. *Id.*

8. **LEGAL EFFECT OF ABANDONMENT, IN SENSE IN WHICH IT IS USED IN POLICIES** of marine insurance and in the law regulating that subject, is to operate as a transfer to the underwriter of the property insured, but only to the extent of the indemnity contemplated by the policy. *Cincinnati Ins. Co. v. Duffield*, 339.
9. **IN CASE OF ABANDONMENT, PROCEEDS OF WRECK INURE TO BENEFIT OF PARTIES BEARING LOSS:** to the underwriters in proportion to the parts by them severally insured, and to the owner in proportion to the part remaining uninsured. *Id.*
10. **LEGAL EFFECT OF ABANDONMENT IS NOT CHANGED BY INSERTING THIS CLAUSE** in a policy of marine insurance: "In all cases of abandonment, the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat, and every part thereof, free from all claims and charges whatever." This clause was merely intended to prescribe the form in which the transfer should be made to the underwriters of the interest which they derive by law from the abandonment, and to point out the mode in which the intention to abandon should be unequivocally expressed. But it cannot have the effect of discharging the insurers from their legal liability to account to the assured for his proportion of the proceeds of the wreck after abandonment. *Id.*

JUDGMENTS.

1. **JUDGMENT BY DEFAULT PRECLUDES PARTY FROM USING, FOR PURPOSE OF REDUCING DAMAGES, TESTIMONY** which would have defeated the action had plea in bar been interposed. *Garrard v. Dollar*, 271.
2. **JUDGMENT BY DEFAULT ADMITS TO BE TRUE ALL MATERIAL ALLEGATIONS PROPERLY SET FORTH IN DECLARATION.** *Id.*
3. **AFTER JUDGMENT RECOVERED BY ONE PARTY IN HIS OWN NAME, AND PAYMENT OF SAME TO HIM,** another person who claims a portion of the sum recovered cannot have a trial of his right thereto by moving the court in which the judgment is entered to direct the payment of such portion to him, and that the judgment be marked for his use to that extent, and jurisdiction would not be conferred upon the court to decide the matter in that way by agreement of the parties to consider the money in court for the purpose of the motion, nor would the fact that the money was actually in court alter the application of the rule. *Hudson's Appeal*, 445.
4. **UNSATISFIED JUDGMENT MAY BE MARKED BY COURT FOR USE OF EQUITABLE CLAIMANT** so as to give defendant notice not to pay it to the legal plaintiffs, but such determination would not be conclusive, especially on third persons, and the facts in such case, whether proved or admitted, are not part of the record, and no appeal lies from the order of the court allowing or refusing a motion to so mark a judgment. *Id.*
5. **JUDGMENTS, EVEN OF SUBORDINATE STATE COURTS, CANNOT BE ATTACKED UPON HABEAS CORPUS,** however erroneous they may be, on appeal or writ of error, where jurisdiction of the person and subject-matter has been acquired; and this principle is applicable *a fortiori* to the judgment of a federal court. *Williamson's Case*, 374.
6. **VOID JUDGMENT IS NO JUDGMENT AT ALL; AND EVERY JUDGMENT IS VOID** which clearly appears on its own face to have been pronounced by a

court having no jurisdiction of the person or authority over the subject-matter. *Id.*

JURISDICTION.

1. OBJECTION TO JURISDICTION OF COURT OF CHANCERY OF TENNESSEE IS WAIVED, under the Tennessee act of 1852, c. 365, sec. 9, if, without demurrer, an answer is put in; and the same is true if a defendant, being regularly served with process, neglects to appear, and judgment *pro confesso* is entered up against him. *Moreau v. Saffarans*, 582.
2. PRIMA FACIE JURISDICTION OVER WARD IS SHOWN by the finding of a court that the person assuming to act as guardian was such in fact. *Lessee of Merritt v. Horne*, 298.
3. ESTOPPEL.—WHERE INDIVISIBLE PREMISES HAVE BEEN SOLD UNDER PARTITION PROCEEDINGS, and the husband of the infant, acting as her guardian, with a full knowledge of the facts, acknowledges the former guardian and receives from him the proceeds of the sale of such property, he will be estopped to prove that such person was not duly appointed, and cannot, after the wife's death, deny the court's jurisdiction over the infant. Such estoppel is equally effectual at law and in chancery. *Id.*
4. PROCEEDINGS OF COURTS OF COMPETENT JURISDICTION CANNOT BE REVISED by another court in a collateral proceeding. *Allen v. Gault*, 485.
5. NEW YORK COURT OF APPEALS CANNOT, IN EQUITY SUIT, REVIEW QUESTIONS OF FACT determined by the supreme court. *Newton v. Bronson*, 89.
See PROCESS, 1; STATUTES, 2.

JURY AND JURORS.

- IT IS GOOD CHALLENGE TO JUROR, FOR CAUSE, ON PART OF STATE, that he has conscientious scruples against finding a verdict of guilty where the punishment is death. *Hyde v. State*, 630.
- See BANKRUPTCY, 3; CRIMINAL LAW, 12; INSURANCE, 7; PLEADING AND PRACTICE, 10-13.

JUSTICES OF THE PEACE.

1. JUSTICES OF PEACE DERIVE ALL THEIR JUDICIAL POWERS FROM LEGISLATION. They exercise no common-law powers. *Albright v. Lapp*, 402.
2. JUSTICE OF PEACE, IN PENNSYLVANIA, HAS NO POWER TO SUMMARILY PUNISH PERSON FOR CONTEMPT committed before him. *Id.*
3. REMEDY OF JUSTICE OF PEACE FOR CONTEMPT COMMITTED IN HIS PRESENCE is to bind the contumacious party over to answer at court, and to be of good behavior meanwhile. *Id.*
See EVIDENCE, 2; EXECUTIONS, 4; STATUTES, 2.

LACHES.

- LACHES CANNOT BE IMPUTED TO COMMONWEALTH by a corporation. *Commonwealth v. Erie etc. R. R. Co.*, 471.

LANDLORD AND TENANT.

1. UNDER LEASE OF FARM UPON SHARES, WHICH PROVIDES THAT STOCK AND PRODUCE IS TO BE AT CONTROL of the lessor until sold, he can hold them against the creditors of the lessee. The lessee has no interest in

the crops while growing upon the land, nor after they are harvested, and they are not subject to attachment for his debts. *Esdon v. Colburn*, 730.

2. WHERE LEASE OF FARM UPON SHARES PROVIDES THAT STOCK AND PRODUCE OF FARM IS TO BE AT CONTROL of the lessor until sold, and the lessor and lessee have a settlement, whereby the lessee, for a consideration, relinquishes his claim to his share of the proceeds of a sale of the crops, there is no necessity for a delivery or change of possession to vest the title to the entire crop in the lessor. *Id.*

See ADVERSE POSSESSION, 6.

LARCENY.

See CRIMINAL LAW, 5-10.

LIBEL.

1. NOTICE OF DEATH OF LIVING PERSON PUBLISHED MALICIOUSLY, and calculated to subject the person to ridicule, is libelous and actionable. *McBride v. Ellis*, 553.
2. NEW TRIAL OF ACTION FOR LIBEL WILL NOT BE GRANTED on the ground that plaintiff's counsel submitted certain writings of defendant to defendant's witnesses for the purpose of testing their accuracy in recognizing the defendant's handwriting, and afterwards, by his own witnesses, proved such writings to be authentic, when the writings themselves were not submitted to the jury either in the argument or in their deliberations. *Id.*

LICENSE.

REVOCABILITY OF MERE LICENSE TO ENTER UPON AND USE LAND of the licensor, whether it be given by deed or by parol, is a well-settled doctrine of the common law. *Foster v. Browning*, 505.

See WAYS, 2.

LUNATICS.

See EXECUTORS AND ADMINISTRATORS, 3; GUARDIAN AND WARD, 8.

MANDAMUS.

1. MANDAMUS IS PROPER REMEDY TO COMPEL RAILROAD COMPANY TO CONSTRUCT ROAD PURSUANT TO CHARTER in crossing navigable streams so as not to obstruct navigation, though indictment lies as for a nuisance. *State v. North-eastern R. R. Co.*, 551.
2. RULE THAT MANDAMUS WILL NOT BE GRANTED WHERE THERE IS SPECIFIC LEGAL REMEDY is restricted to cases where the legal remedy is equally convenient, complete, and beneficial. *Id.*
3. MANDAMUS IS APPROPRIATE REMEDY TO ENFORCE PERFORMANCE OF DUTIES BY ARTIFICIAL BODIES. *Id.*

MARRIED WOMEN.

1. IN CONVEYANCE BY DEED OF WIFE'S ESTATE, SHE MUST BE PARTY with her husband to the conveyance, and must be privately examined at the time that the deed is executed. It is not sufficient that at a subsequent period she signs and seals a deed previously made. *Krens v. Peeler*, 286.

2. **MARRIED WOMAN CAN IN NO CASE BE SUED UPON MERE PERSONAL CONTRACT MADE BY HER DURING COVERTURE**, although she lives apart from her husband. *Harris v. Taylor*, 576.
3. **MARRIED WOMAN MAY CONVEY OR MORTGAGE HER LAND** by joining her husband in a deed for that purpose, but to make such deed valid, it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with a full knowledge of its meaning, purpose, and intent, and that her will was perfectly free, and that her mind accorded with the act. *Loulen v. Blythe*, 442.
4. **DEED OF MARRIED WOMAN IS VOID IF HER HUSBAND USES HIS INFLUENCE AND POWER OVER HER** in such manner as to control her unduly, and make her act under his will, and not her own. *Id.*
5. **MARRIED WOMAN'S DEED, TO BE VALID, MUST SHOW THAT IN EXECUTION** there was no imprisonment of her mind nor advantage taken of her weakness, and she must have acted voluntarily and without compulsion, either physical or moral; and the only way these facts can be proved is by a magistrate's certificate that he examined her separate and apart from her husband, that he made the contents of the deed fully known to her, and that she declared her execution of it to be voluntary and free from any sort of coercion. *Id.*
6. **MAGISTRATE'S CERTIFICATE OF ACKNOWLEDGMENT OF DEED BY MARRIED WOMAN**, reciting an examination separate and apart from her husband, and that the execution was voluntary and free from coercion on the part of her husband, is conclusive in favor of one who accepted it in good faith, and paid his money without knowing or having any reason to doubt its truth; but if such certificate be false in fact, and the grantee knew it, or knew of circumstances which would put an honest and prudent man upon inquiry, then it may be contradicted by parole evidence. *Id.*
7. **ACKNOWLEDGMENT OF DEED BY MARRIED WOMAN IS VOID** if the evidence shows that the examination was in the presence of her husband, that the wife was not properly informed as to the nature of the transaction, or that she was under the influence of fraud or coercion. *Id.*
8. **DECLARATIONS OF MARRIED WOMAN MADE WHILE DEED WAS BEING PREPARED**, of her unwillingness to execute it, though not made in the presence of the grantee, are admissible as part of the *res gestæ* to show the invalidity of the execution of such deed. *Id.*

See DOWER; HUSBAND AND WIFE; TRUSTS AND TRUSTEES, 4.

MASTER AND SERVANT.

1. **MASTER IS NOT LIABLE FOR INJURY DONE BY ONE SERVANT TO ANOTHER**, engaged in a common employment, through negligence or unskillfulness. *Fox v. Sandford*, 587.
2. **TO RENDER DEFENDANT LIABLE WHERE ACT COMPLAINED OF WAS NOT DONE BY HIM**, the relation of master and servant must exist between him and those by whose instrumentality the act was done, except in some case where he renders himself a legal participator in wrongful acts by subsequently adopting and sanctioning them. *McGuire v. Grant*, 49.
3. **MASTER'S RESPONSIBILITY FOR TORTIOUS ACTS OF HIS SERVANT WHICH WERE DONE IN HIS SERVICE** grows out of, is measured by, and begins and ends with his control over them. *Id.*

4. OWNER, OR PRINCIPAL CONTRACTOR, OR MASTER WORKMAN, IS NOT RESPONSIBLE FOR DAMAGE OCCASIONED by the wrongful acts of persons employed by a subcontractor or under-workman, or by a person carrying on a distinct independent employment, because they are not his servants, and do not act for him, but for their immediate employer. *Id.*
5. WHERE CHAIRMAN OF STREET COMMITTEE OF MUNICIPAL CORPORATION ORDERS LAWFUL ACT, such as the performance of certain work, to be done, and the work is done, so as to occasion an actionable injury, by workmen under the immediate superintendence and direction of the street commissioner, who is a distinct and independent officer of such corporation, not appointed or controlled by the committee, such chairman is not liable for injury resulting from the work. *Id.*

MAXIMS.

MAXIM, SIC UTERE TUO UT ALIENUM NON LÆDAS, IS NOT LIMITED TO COMMON NUISANCES. It has a much more extensive application, and under it one cannot escape liability where he knowingly leases a building to be so used as to hurt another or his property. *Carson v. Godley*, 404.

MORTGAGES.

1. CHATTEL MORTGAGE CANNOT BE IMPEACHED BY EVIDENCE THAT MORTGAGOR, AFTER EXECUTING IT, EXECUTED MORTGAGES of the same property to other persons, which were fraudulent towards his creditors. *Ford v. Williams*, 83.
2. CHATTEL MORTGAGE ON STOCK OF GOODS WHICH PERMITS MORTGAGOR TO CONTINUE BUSINESS, make sales of the goods, and use the proceeds as his own, is void *per se*, for fraud towards creditors, unless the proceeds are applied to the mortgage debt, in which case it may be upheld. *Id.*
3. POSSESSION OF MORTGAGOR IS THAT OF MORTGAGEE, and the former cannot make a lease of the premises so as to bind the latter. *Martin v. Jackson*, 489.
4. REMEDY BY SCIRE FACIAS ON MORTGAGE DOES NOT EXCLUDE REMEDY BY EJECTMENT. *Id.*

See ADVERSE POSSESSION, 2, 3, 6, 7; FIXTURES, 3; HOMESTEADS.

MUNICIPAL CORPORATIONS.

See CORPORATIONS.

NAVIGABLE RIVERS.

See WATERCOURSES.

NEGLIGENCE.

1. WHAT CONSTITUTES NEGLIGENCE IN REGARD TO DUTY ENJOINED BY ANY PARTICULAR RELATION OR EMPLOYMENT is usually, if not invariably, a mixed question of law and of fact; but what duty the law implies as incident to any particular relation or employment is always a question of law for the determination of the court. *Mad River etc. R. R. Co. v. Barber*, 312.
2. GROSS NEGLIGENCE IN CONSTRUCTING AND RENTING INSECURE BUILDING RENDERS OWNER LIABLE to a party whose goods are injured by its

fall, if there is no negligence on the part either of tenants or of the party storing the goods. *Carson v. Godley*, 404.

3. ONE WHO BUILDS AND LEASES HOUSES IS BOUND BY LEGAL DUTY TO CONSTRUCT THEM IN PROPER MANNER and with good materials and competent workmen, and neither good faith nor even the best faith will relieve him from liability for injuries resulting from failure to do so. *Id.*
4. EVIDENCE OF FALL OF OTHER STORES BUILT BY DEFENDANT in the same row is competent to show that the owner had notice of the insufficiency and unsafety of a store similarly constructed; but is not competent to establish his reputation or that of his mechanics as builders. *Id.*

See COMMON CARRIERS, 2-5, 8; LACHES; MASTER AND SERVANT, 1; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. ANY MATERIAL ALTERATION OF COMMERCIAL PAPER is fatal to a recovery upon it if unaccounted for by him who holds it. *Miller v. Reed*, 459.
2. COMMON-LAW DISTINCTIONS BETWEEN INSTRUMENTS JOINT AND THOSE JOINT AND SEVERAL were extinguished by the assembly acts of April 6, 1830, and April 11, 1848, in Pennsylvania, in the class of cases provided for by those statutes. *Id.*
3. ALTERATION OF NEGOTIABLE NOTE EXECUTED BY TWO PERSONS, BY INTERLINING words "or either of us," is not such a material alteration, in Pennsylvania, as will avoid the note. *Id.*
4. WHERE DEBTOR VOLUNTARILY TRANSFERS NEGOTIABLE INSTRUMENT TO SECURE DEBT PREVIOUSLY INCURRED by him without any agreement for security, and the parties are left, after such transfer, *in statu quo* as to the debt, no new consideration, stipulation for delay, or credit being given, or right parted with by the creditor, such instrument is not received by the creditor in the usual course of trade, for value, but is taken subject to all the equities existing against it at the time of the transfer. *Roxborough v. Messick*, 346.
5. NOTE WITH PAYEE'S NAME IN BLANK CANNOT BE SO SUED UPON as a promissory note. The holder must fill up the blank by inserting his own name as payee, so as to show a cause of action in himself, or else an objection by demurrer, or specially upon the trial, will be fatal. *Seay v. Bank of Tennessee*, 579.
6. LETTERS OF DRAWER AFTER ACCEPTANCE OF DRAFT, DIRECTING DRAWEE TO WITHHOLD payment of part, because the draft was drawn for too much, are inadmissible evidence in an action by the holder against the drawee. *Moke v. Fellman*, 656.
7. VERDICT FOR "AMOUNT DUE ON THE DRAFT, WITH USUAL INTEREST," is sufficiently certain to support a judgment for the amount of the draft and interest, less a credit appearing on the draft. *Id.*
8. NOTICE TO INDORSER MUST BE SENT TO PLACE OF HIS RESIDENCE, UNLESS HE IS SHOWN TO HAVE his place of business elsewhere. A notice sent to him at one place, at which a corporation of which he was president had its office, when he resided at another, is not sufficient, in the absence of proof that the former was his place of private business. *Commercial Bank of Albany v. Strong*, 714.

9. DEPOSIT OF NOTICE OF DISHONOR OF BILL IN POST-OFFICE DOES NOT HAVE TO BE SHOWN by a single witness who can swear positively that he so deposited it. All who had anything to do about the matter of depositing the notice should be called, and if their united testimony shows that it was deposited, that is sufficient. *Id.*
10. PROOF OF DEPOSIT OF NOTICE IN POST-OFFICE.—One clerk in a bank testified that he inclosed a notice of the dishonor and protest of a bill of exchange in an envelope addressed to defendant, and placed it on his desk, from whence it was the duty of either one of two other clerks to take letters to the post-office; also that at a later hour of the day the letter was gone. The other clerks testified that it was their duty to take all letters from this desk; that they invariably did so, and that if they took this notice they immediately put it in the post-office. The defendant was shown to have received the notice, but at what time does not appear. *Held*, that these facts show that the notice was mailed in time. *Id.*

NOTICE.

See ATTORNEY AND CLIENT, 1; DEEDS, 14, 15.

NUISANCE.

1. PRIVATE NUISANCE IS ANYTHING WHICH DOES HURT OR ANNOYANCE to the lands, tenements, or hereditaments of another. The annoyance need not be such as to endanger health, but it is sufficient if it is offensive to the senses, and renders the enjoyment of life and property uncomfortable, or even causes a well-founded apprehension of danger. *Burditt v. Swenson*, 665.
2. LIVERY-STABLE IN TOWN IS NOT NUISANCE *prima facie*, but becomes so if kept or used so as to destroy the comfort of owners and occupants of adjacent premises, and so as to impair the value of their property. *Id.*
3. PERPETUAL INJUNCTION AGAINST KEEPING LIVERY-STABLE upon a lot adjacent to plaintiff's store in a town will be awarded where it appears that it is kept in a filthy and unsafe condition, so as to be offensive and dangerous to the plaintiff, and the owners thereof insist that it is well kept, and do not propose to keep it differently; and the injunction will not be limited to restraining the manner of keeping it. *Id.*

See MANDAMUS, 1; MAXIMS; WATERCOURSES, 6, 10.

OFFICE AND OFFICERS.

1. BOND OF COUNTY TREASURER IS CONTRACT THAT HE WILL NOT FAIL, UPON ANY ACCOUNT, to receive and safely keep the public money, and pay it out according to law. *State v. Harper*, 363.
2. THAT MONEY WHICH CAME TO HANDS OF COUNTY TREASURER WAS STOLEN from him without his fault is no defense to an action upon his official bond. *Id.*
3. CONTRACTS BASED ON SALE OF OR TRAFFIC IN OFFICES of any description are void, as against public policy. *Eddy v. Capron*, 541.
4. DRAFT DRAWN IN CONSIDERATION OF RESIGNATION OF OFFICE of physician to a United States marine hospital, in the drawer's favor, is void, although there was no promise to recommend the drawer's appointment, and although the resigning officer had already resolved to remove to another

state, and merely wished to get back money previously paid by him to the drawer for resigning the same office in his favor. *Id.*

See EXECUTORS AND ADMINISTRATORS, 1, 2.

PARDONS.

PARDON CANNOT BE PROVED BY COPY OF EXECUTIVE MINUTES certified by the secretary of the commonwealth. Either the pardon or a certified copy should be produced. *Cox v. Cox*, 432.

PARENT AND CHILD.

1. CONTRACTS BETWEEN PARENTS AND CHILDREN must be proved by direct, positive, express, and unambiguous evidence. The terms must be clearly defined, and all the acts necessary to a contract's validity must have especial reference to it, and nothing else. *Poorman v. Kilgore*, 425.
2. WHERE CHILDREN WORK FOR PARENTS AFTER ARRIVING AT AGE, the law implies no contract on the part of the parent to pay for the services. *Id.*
3. NO SALE OR GIFT CAN BE INFERRED FROM a parent giving a child the use of a farm or house, and promising a gift of the same at his (the parent's) death. *Id.*
4. LAW WILL NOT INFER GIFT FROM PARENT TO CHILD where his acts can be readily accounted for as founded on other intentions. *Id.*
5. IMPROVEMENTS MADE BY CHILD ON HIS PARENTS' LAND on the promise that the land would be given to him at his father's death will not take the case out of the statute of frauds. *Id.*

See HABEAS CORPUS, 6; TRUSTS AND TRUSTEES, 8, 9.

PARTITION.

1. PARTITION CANNOT BE EMPLOYED AS MEANS OF SETTLING CONFLICTING TITLES. *Brock v. Eastman*, 733.
2. PARTITION, WHO MAY COMPEL.—One holding under a deed of an undivided half of a certain farm, in which deed the grantor reserves a life estate, cannot, during the life of the latter, compel partition against a grantee of the other undivided half of said farm, as a right of immediate possession is necessary to the maintenance of this proceeding. *Nichols v. Nichols*, 699.
3. IN PROCEEDING FOR PARTITION, EVIDENCE THAT CERTAIN DEED UNDER WHICH PETITIONER CLAIMS is void for want of proper delivery is admissible for the purpose of defeating his title and right to maintain the proceeding. *Id.*
4. UNDER STATUTE PERMITTING REVIEWS IN "CIVIL CAUSES," PETITION FOR PARTITION cannot be reviewed, as those words have reference only to those suits or actions which are commenced and prosecuted according to the course of the common law. *Id.*
5. SALE IN PARTITION SUIT WILL PASS NOTHING BUT TITLE WHICH WAS VESTED in parties to the proceeding. *Allen v. Gault*, 485.
6. SALE OF LANDS BY SHERIFF UNDER ORDER OF COURT OF RECORD IN ACTION OF PARTITION is in pursuance of a judgment of such court, and can be confirmed or set aside by the judgment of that court alone; and if the purchaser to whom the property is sold under such proceedings claims to have reason for setting aside the sale, he must apply for relief to the

court having jurisdiction of the case, and by whose order the sale was made. *Id.*

7. PARTITION.—ONE WHO CAUSES EXECUTION TO BE LEVIED UPON UNDIVIDED PORTION of a piece of property of which the owner is in the possession, claiming adversely to any title under the levy, cannot maintain partition, as, if the levy was valid, it could only give a right of entry, which is not sufficient to maintain a petition for partition. *Brock v. Eastman*, 733.

See CO-TENANCY; DOWER.

PARTNERSHIP.

1. CONVEYANCE TO "J. L. S. & Co." OPERATES TO INVEST J. L. S., INDIVIDUALLY, WITH ENTIRE LEGAL TITLE to real estate purchased with partnership funds for the use of the partnership, but in equity he will be treated as holding the legal title in trust for the benefit of the partnership. *Moreau v. Saffarans*, 582.
2. DECREE CONCERNING REAL ESTATE, HELD BY ONE PARTNER AS TRUSTEE FOR FIRM, WILL NOT BE SET ASIDE as irregular and void because the other partners were not made parties; but such decree operates upon the trustee alone, and will be modified, if otherwise, to that effect. *Id.*
3. PARTNERSHIP PROPERTY IS PRIMARILY LIABLE TO PAY PARTNERSHIP DEBTS; and the surplus, if any, belongs to the partners. *Miller v. Estill*, 305.
4. PARTNERS MAY ENFORCE THEIR EQUITABLE LIEN ON PARTNERSHIP PROPERTY to pay partnership debts in preference to the creditors of individual partners. *Id.*
5. CREDITORS OF PARTNERSHIP HAVE NO LIEN ON PARTNERSHIP PROPERTY, and can invoke the rule that the partnership property shall be primarily liable only through right of partners to have joint property applied to pay joint debts. *Id.*
6. WHEN RIGHT OF PARTNERS THEMSELVES TO APPLY PARTNERSHIP PROPERTY IN EXTINGUISHMENT of partnership debts is gone, the right of partnership creditors thus to apply is also divested. *Id.*
7. SALE, OR ANY CONTRACT HAVING EFFECT OF SALE, BY ONE PARTNER TO HIS COPARTNERS, WILL DIVEST all further lien he may have upon the partnership effects. *Id.*
8. WHERE ONE PARTNER TAKES PARTNERSHIP PROPERTY ON CONSIDERATION THAT HE WILL PAY the debts of the partnership, the retiring partner's lien upon the partnership effects is gone; though if the agreement be to take the partnership property and pay the partnership debts therewith, a court of equity would, perhaps, enforce a proper application of the assets of the firm in behalf of the retiring partner. *Id.*
9. WHERE FIRM IS DISSOLVED AND ITS PROPERTY DIVIDED BETWEEN PARTNERS, the members of the firm cannot, in contemplation of insolvency, make an assignment of their property, both individual and that derived from the firm, for the benefit of and giving preference to their individual creditors, to the exclusion of their firm creditors. The statute relating to assignments in contemplation of insolvency will operate upon the assignment and work out an equal distribution. *Id.*
10. IF PARTNER, IN CONTEMPLATION OF INSOLVENCY, DISSOLVES PARTNERSHIP BY GENERAL ASSIGNMENT of his interest and property in the firm,

makes an assignment of his individual property, and authorizes the assignee to dispose of the same and pay the proceeds over to his individual creditors, the funds in the assignee's hands must be distributed *pro rata* among his own creditors and those of the firm from which he has retired. *Id.*

11. WHERE PARTNER, IN CONTEMPLATION OF INSOLVENCY, HAS DISSOLVED PARTNERSHIP BY ASSIGNMENT TO TRUSTEE, and the partnership property is by agreement divided between the retiring partner and his associates so as to leave the property as it was before the partnership, on consideration that the remaining copartners will pay the partnership debts; and the copartners form a firm of their own, but in contemplation of their own insolvency assign all their own individual and partnership property to a trustee with directions to pay the partnership debts—the funds in the hands of the trustee of the latter firm must be distributed *pro rata* among the creditors of both the former and the latter firms; and if any balance of the funds of the latter firm remains after paying the debts of both firms, the same may be adjusted to reimburse the retiring partner, in view of the agreement that the latter firm would pay the debts of the former. *Id.*
12. PARTNERSHIP CREDITORS HAVE NO LIEN, WHILE PARTNERS ARE ADMINISTERING their own funds, on the joint property for the payment of their claims, nor have creditors of individual partners any lien upon their separate property, or any priority of payment out of it. *Tillinghast v. Champlin*, 510.
13. PARTNERSHIP CREDITORS HAVE EQUITABLE LIEN IN CASE FIRM IS DISSOLVED BY DEATH of a partner, or in case of the bankruptcy or insolvency of one or all the partners, upon the joint property of the firm, and separate creditors have a similar lien and priority as to the separate property of the partners. *Id.*
14. COMPLAINANT CANNOT HAVE RELIEF ON ANOTHER GROUND, WHERE BILL CHARGES ACTUAL FRAUD as the ground of relief and the fraud is not proved, but the bill must be dismissed with costs, and this though the word "fraudulent" is not used, if the facts alleged and the relief asked show that fraud is the real ground of complaint; but where such a bill is filed by a partnership receiver, under legal advice, and in the interest of creditors, to recover assets alleged to have been fraudulently transferred, it will be dismissed without prejudice, and costs will be allowed out of the partnership fund. *Id.*
15. REALTY CONVEYED TO PARTNERS AS CO-TENANTS IS PARTNERSHIP PROPERTY, in equity, where it is purchased with partnership funds for the use of the firm. *Id.*
16. DECEASED PARTNER'S SHARE OF SURPLUS OF PARTNERSHIP REALTY, after the payment of the firm debts and the adjustment of the mutual equities of the partners, is regarded in American courts of equity as realty, and descends to the heir, but the rule seems to be otherwise in England. *Id.*
17. BONA FIDE PURCHASER OF PARTNER'S LEGAL TITLE IN PARTNERSHIP REALTY, conveyed to the partners as tenants in common, having no notice of the equitable rights of the copartners or partnership creditors in the land as partnership property, will be protected in equity as well as at law. *Id.*

18. **SURVIVING PARTNER MAY DISPOSE OF PARTNERSHIP REALTY** for the payment of partnership debts, and of any balance due him as a partner, if the legal title is vested in him, and if not, equity will assist him by compelling a conveyance of the legal title to himself or to a purchaser from him. *Id.*
19. **PURCHASER OF PARTNERSHIP REALTY FROM SURVIVING PARTNER**, though he knows it to be partnership property and that there are partnership debts to be paid out of it, if he honestly buys it and pays for it, without knowledge or notice of any facts indicating an intent by the surviving partner to misapply the funds, will be protected, although such surviving partner does in fact appropriate the money to his own use, leaving the debts unpaid; but where he purchases either the whole of such realty or the surviving partner's undivided legal interest therein, knowing it to be partnership property, and that the firm is nearly or quite insolvent, and receives the conveyance, and pays the purchase money secretly, and at night, under circumstances indicating knowledge of the fraudulent designs of the surviving partner, who immediately absconds, leaving the firm debts unpaid, such purchaser takes the property subject to the trusts under which it was held by his vendor. *Id.*
20. **PARTNERSHIP RECEIVER, APPOINTED IN SUIT BY REPRESENTATIVE OF DECEASED PARTNER** against the surviving partner to compel a settlement of the affairs of the partnership, and the application of its property to its debts, is an officer of the court, invested with the whole equitable title to the firm assets without an assignment; represents, in any suit affecting the partnership property, the interests therein of all parties to the suit in which he was appointed, if not of persons who are not parties; is clothed with all the rights and equities of the deceased partner, for the purposes of his trust; and may sue, without leave, in this country, to obtain possession of the partnership property for the purpose of applying it to the partnership debts, and need not, on a bill filed for that purpose, join the representative of the deceased partner as a party. *Id.*

PERSONAL PROPERTY.

1. **LIFE ESTATE IN PERSONAL PROPERTY GIVES DONEE RIGHT TO CONSUME** the same where it cannot be used without consuming it, or to wear it out where it cannot be used without so doing. *German v. German*, 451.
2. **LIABILITY OF LIFE TENANT OF PERSONALTY OVER TO REMAINDERMAN** is governed by the intention of the donor, as manifested by the instrument which evidences the gift. *Id.*
3. **WHERE LIFE ESTATE ONLY IN PERSONALTY IS GIVEN, AND REMAINDER IS GIVEN OVER TO OTHERS**, the representatives of the donee for life should account for the value of the property according to the principles of the civil law, as adopted by the courts. *Id.*

PLEADING AND PRACTICE.

1. **NON-JOINDER OF NECESSARY PARTIES PLAINTIFF IN ACTION ON CONTRACT** may be taken advantage of by defendant, under the general issue, by motion in arrest of judgment, or by writ of error, when the defect appears upon the record. *Scott v. Brown*, 256.

2. NON-JOINDER OF NECESSARY PARTIES PLAINTIFF IN ACTION OF TORT must be taken advantage of by defendant by plea in abatement, and not by way of nonsuit on the trial. *Id.*
3. NON-JOINDER OF NECESSARY PARTIES PLAINTIFF IN ACTION OF TORT ARISING EX CONTRACTU may be taken advantage of by defendant by plea in abatement or under the general issue on the trial. *Id.*
4. DEFENDANT MAY DENY HIS LIABILITY UNDER GENERAL ISSUE, but he must plead justification specially. *McGuire v. Grant*, 49.
5. ONLY THOSE GROUNDS OF DEMURRER THAT GO TO PLAINTIFF'S RIGHT OF ACTION will be considered upon an appeal from a judgment overruling a general demurrer. *George v. Thomas*, 612.
6. OBJECTION OF WANT OF PARTICULARITY IN STATEMENT OF CAUSE OF ACTION is not raised by general demurrer. *Id.*
7. MULTIFARIOUSNESS CANNOT BE ASSIGNED FOR ERROR, under the Tennessee act of 1852, c. 365, sec. 7, unless the objection is first made by demurrer to the bill, taken at the proper time. *Moreau v. Saffarans*, 582.
8. IRRELEVANT MATTER IN PLEADING MIGHT BE STRICKEN OUT on motion of the party prejudiced thereby, prior to the act of 1856 amending the Ohio code of civil procedure. *State v. Harper*, 363.
9. AMENDMENT PURPORTING TO BRING IN NEW PLAINTIFF (here the attorney general) in place of an individual who began the suit, but has been judicially found not to have a right of action, is not authorized by New York code of procedure. *Davis v. Mayor etc. of New York*, 186.
10. IT IS NOT ERROR FOR COURT TO OMIT TO CHARGE ON EVERY POSSIBLE ASPECT OF FACTS, especially when uninvited by the party complaining. *Kauffman v. Griesemer*, 437.
11. ERROR IN INSTRUCTION FAVORABLE TO APPELLANT is no ground for the reversal of a judgment. *Wintz v. Morrison*, 658.
12. INSTRUCTION ASSUMING FACT TO BE DOUBTFUL WHEN THERE IS NO CONFLICT of evidence respecting it, or assuming hypothesis at variance with the fact, should not be given. *Id.*
13. RULE THAT JUDGE SHOULD NOT CHARGE ON WEIGHT OF EVIDENCE applies only where there is doubt, and the jury are required to weigh the evidence. *Id.*
14. RECOVERY IN FORMER SUIT IS BAR TO SUBSEQUENT ACTION FOR SAME BREACH OF COVENANT assigned as cause of action in the former suit. *Winslow & Cannon v. Stokes*, 242.
15. IN ACTION FOR BREACH OF COVENANT, WHERE PLAINTIFF IS ENTITLED TO RECOVER DAMAGES, present and prospective, and is restricted therefrom by instructions, this is an error which must be corrected by proper steps in that action, and does not entitle plaintiff to recover in a second suit. *Id.*
16. DEFENDANT MUST ELECT BETWEEN TWO CONTRADICTIONARY DEFENSES, and evidence should be permitted only in support of the one on which he determines to rely. *Cox v. Cox*, 432.
17. STATEMENTS IN ANSWER NOT RESPONSIVE TO BILL MUST BE PROVED. *Ives v. Hazard*, 500.
18. AVERMENT IN ANSWER TO BILL FOR SPECIFIC PERFORMANCE THAT CONTRACT WAS CONDITIONAL on its being approved by the defendant's wife, no such condition being expressed in the memorandum sued on, is not responsive to the bill, and must be proved by evidence independent of the answer. *Id.*

19. OBJECTION THAT CASE PROVED IS NOT THAT ALLEGED IN COMPLAINT, IF NOT SPECIFICALLY MADE AT TRIAL, IS NOT AVAILABLE ON appeal, and a general exception that "as well upon the facts as the law" the appellant was entitled to recover will not raise the question. *Belknap v. Sealey*, 120.
20. OBJECTIONS TO EVIDENCE SHOULD STATE GROUNDS THEREOF. *George v. Thomas*, 612.
21. ERROR IN REFUSING TO PERMIT COMPETENT TESTIMONY TO GO TO JURY is not cured by consent of the adverse party afterward to go into the inquiry proposed by the rejected testimony. *Reynolds v. Tucker*, 353.
22. ASSIGNMENTS OF ERROR NOT MADE IN ACCORDANCE WITH RULES OF COURT will not be noticed. *Martin v. Jackson*, 489.
23. NEW TRIAL REOPENS ALL ISSUES IN CAUSE when asked and granted in general terms, although some of the issues were found in favor of the party asking for the new trial, and the court will not ordinarily restrict the new trial to the issues found against such party, without the consent of the adverse party. *Foster v. Browning*, 505.
24. AWARD OF NEW TRIAL ON PETITION AFTER TERM IS EXERCISE OF EQUITABLE JURISDICTION under the Texas practice, analogous to that exercised by courts of chancery in England and in the American common-law states in granting new trials at law. *Goss v. McClaren*, 646.
25. NEW TRIAL IS NEVER GRANTED TO PARTY NEGLIGENCELY SUFFERING JUDGMENT to go against him through want of knowledge of material facts which with reasonable diligence he might have known in due season, either by courts of law or courts of equity. *Id.*
26. NEW TRIAL WILL NOT BE GRANTED AFTER TERM EXCEPT ON GROUNDS SUFFICIENT to have entitled the party to a new trial if applied for at the term, and upon the showing of a sufficient excuse for not applying at that time. *Id.*
27. NEW TRIAL WILL NOT BE GRANTED AFTER TERM ON GROUND OF IGNORANCE of the recovery of judgment by the party during the term where he was duly served with process, but made no defense because he had spoken to his warrantor to defend the suit and the latter inadvertently omitted to do so. *Id.*
28. UNSUPPORTED AFFIDAVIT OF PRISONER FOR NEW TRIAL on the ground of absent testimony is insufficient. *Dignowitty v. State*, 670.
29. COUNTER-AFFIDAVIT IN RESPONSE TO AFFIDAVIT FOR NEW TRIAL is admissible. *Id.*
30. JUDGE HAS NO DISCRETION TO GRANT NEW TRIAL AFTER TERM at which judgment was rendered, the judgment then being a vested right, which can be divested only by some direct proceeding. *Goss v. McClaren*, 646.
31. WRIT OF ERROR CANNOT BE PROSECUTED by persons who are not parties upon the record; and not being parties, cannot be affected by the decree. *Moreau v. Saffarans*, 582.
32. PLAINTIFF IN ERROR MUST BRING UP RECORD SO PRESENTING FACTS as that it may be seen on what state of case the court below acted, and if there be error, that it may be certainly seen in what it consists. *Kirk v. Murphy*, 640.
33. FAILURE TO MAKE PART OF RECORD PAPER IN WHICH VARIANCE IS ALLEGED TO EXIST, where there is a contradiction in the record as to what paper it occurs in, renders it uncertain in what the error, if any, consists, and therefore there will appear no ground for reversal. *Id.*

34. WHERE IT IS SOUGHT TO BAR WRIT OF ERROR BY MATTERS OF FACT which do not appear on record returned, they should be brought to the view of the court, either by plea or by motion to quash. *Showers v. Showers*, 487.
 35. TO ENTITLE PARTY TO POSTPONEMENT OF TRIAL ON GROUND OF ABSENCE OF WITNESSES, three things are necessary: 1. To satisfy the court that the persons are material witnesses; 2. To show that the party applying has been guilty of no laches nor neglect; 3. To satisfy the court that there is reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off. *Hyde v. State*, 630.
 36. AFFIDAVIT ON SECOND APPLICATION FOR CONTINUANCE ON GROUND OF ABSENCE OF WITNESSES, after one continuance granted for the same cause, should be more explicit, and show what are the facts of the case, and what means of information applicant's witnesses possess; and if the second affidavit is less full, this may furnish ground to suspect that the object was delay. *Id.*
 37. FACT THAT WITNESSES ARE BEYOND LIMITS OF STATE is not good ground for continuance, when the defendant has had time to prepare his defense. *Id.*
 38. MOTION FOR CONTINUANCE ON GROUND OF ABSENCE OF WITNESSES should not be refused because adverse party admits that the witnesses, if present, would testify as stated in defendant's affidavit; but notwithstanding this admission, the refusal of the motion will not be error if based upon a well-founded doubt of the verity of the affidavit itself, and a belief that the application was for delay. *Id.*
 39. RULES GOVERNING APPLICATIONS FOR CONTINUANCE OF CAUSES are, in general, the same, both in civil and criminal cases, though in the latter the matter is to be scanned more closely. *Id.*
 40. CONTINUANCE OF CAUSE IS MATTER OF RIGHT WHEN AFFIDAVIT THEREFOR CONFORMS TO STATUTE, and want of proper diligence cannot be imputed, and there is no cause to suspect that the application is for delay. *Id.*
 41. COUNTER-AFFIDAVITS TO SHOW WANT OF DILIGENCE AND IMPROBABILITY OF ANY REASONABLE EXPECTATION that the proposed testimony can be obtained at all, or at the time to which it is proposed to postpone the trial, may be received on application for a continuance of a cause for the purpose of the production of evidence. *Id.*
 42. EVIDENCE PRODUCED AT TRIAL WILL BE CONSIDERED IN REVIEWING REFUSAL TO GRANT CONTINUANCE, when, upon appeal, a motion for a new trial brings before the court a statement of the evidence; and if from such evidence there appears a cause to apprehend that a continuance was improperly refused, a new trial must be granted; but if it appears that the application for a continuance could not have been well founded in fact, it affords an additional reason for refusing a new trial or a reversal of the judgment on that ground. *Id.*
- See ATTACHMENT; CONTEMPT, 3, 4; CONTRACTS, 9, 10; CRIMINAL LAW; EJECTMENT, 2; EQUITY, 11, 13; INFANCY, 2; LIBEL, 1, 2; TRESPASS.

PROBATE COURTS.

See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS.

PROCESS.

1. FACT ON WHICH JURISDICTION OF FEDERAL COURTS DEPENDS NEED NOT BE STATED in the process; and the want of such a statement in the body of the *habeas corpus*, or in the petition on which it was awarded, does not give respondent the right to treat it with contempt. *Williamson's Case*, 374.
2. GENERALLY, IN CASE OF INABILITY OF SHERIFF TO EXECUTE PROCESS, the coroner, by virtue of his office, is authorized to act as his substitute; and where he has acted, the legal presumption is that the facts existed which rendered it proper for him to act in the particular instance. *Kirk v. Murphy*, 640.
3. OBJECTION THAT CHRISTIAN NAME OF ONE OF PLAINTIFFS IS INCORRECTLY STATED in copy of citation served on the defendant is properly overruled when it is correctly stated in the copy of the petition. *Id.*

See ARREST; EXECUTIONS.

RAILROADS.

1. CONDUCTOR OR OTHER EMPLOYEE OF RAILROAD COMPANY UNDERTAKES HIS ENGAGEMENT in contemplation of the ordinary hazards of the business, and upon the incidental condition, not that the company will insure him against accidental injuries, but will exercise reasonable and ordinary care and diligence in the discharge of its duties in regard to the business. *Mad River etc. R. R. Co. v. Barber*, 312.
2. RAILROAD COMPANY PLACING ONE PERSON IN ITS EMPLOY UNDER DIRECTION OF ANOTHER IN ITS EMPLOY IS LIABLE FOR INJURIES to the person placed in the subordinate situation, by the negligence of his superior, upon the ground that the injured person, at the time of the injury, was acting under the immediate control and direction of his superior, by whose neglect the injury was received; and thus occupied a position which precluded him from exercising his own discretion in looking to and providing for his own safety. *Id.*
3. RAILROAD COMPANY IS NOT LIABLE TO CONDUCTOR OR OTHER EMPLOYEE FOR INJURY resulting from the carelessness, negligence, or misconduct of another employee, when both are engaged in a common service, and no power or control is exercised by the one over the other. *Id.*
4. RAILROAD COMPANY IS PRESUMED TO USE REASONABLE AND ORDINARY CARE AND DILIGENCE IN HIRING SERVANTS, in keeping its road in repair, and in providing it with sufficient and suitable cars and machinery for its use. Neglect of any such duty will render it liable in damages to one of its conductors or other employees injured on account of such neglect. *Id.*
5. WHERE RAILROAD COMPANY ITSELF IS IN FAULT AS TO ITS OWN PECULIAR DUTIES, and by means of its neglect of that reasonable and ordinary care which it must be presumed to exercise in regard to its own business an injury is occasioned to one of its conductors or other employees, the company is liable in damages, unless the servant was also in fault, and his negligence or misconduct contributed as a proximate cause to the injury. *Id.*
6. CONDUCTOR OR OTHER EMPLOYEE OF RAILROAD COMPANY WAIVES HIS OWN RIGHTS, AND TAKES RISK UPON HIMSELF, if, with the full knowl-

edge of the neglect and omission of said company to employ a sufficient number of hands to manage and safely run a train, to employ suitable and competent persons, to keep its road in proper repair, to provide it with sufficient, safe, and sound machinery, or to otherwise perform its own peculiar duties, he continues on in the business of the company, without any correction of such omission or neglect. *Id.*

7. RAILROAD COMPANY IS NOT LIABLE TO ACTION FOR DAMAGES FOR INJURY RECEIVED BY CONDUCTOR of one of its trains, in consequence of the insufficiency of the cars, or defects in the machinery, or running apparatus of the train under his charge and control, where such insufficiency or defects were unknown to both parties, and neither party was in fault. *Id.*
8. WHERE CONDUCTOR IS SOLE REPRESENTATIVE OF RAILROAD COMPANY SO FAR AS HIS TRAIN IS CONCERNED, it is his duty, as the conductor of such train, to use ordinary and reasonable skill and diligence on his part, not simply in the management of the train, but also in supervising the due inspection of the cars, machinery, and apparatus, as to their sufficiency and safety, while under his charge; and on the discovery of any defect or insufficiency, to notify the company, and to take the proper precautions to guard against danger therefrom. *Id.*
9. PLAINTIFF SEEKING TO RECOVER DAMAGES FROM RAILROAD COMPANY FOR INJURY RECEIVED BY HIM WHILE ACTING AS CONDUCTOR OF ONE OF ITS TRAINS, and caused by the company's failure and neglect to provide the train with sufficient hands, and suitable and safe machinery, etc., must lay a sufficient foundation for a recovery and judgment, in addition to the allegation that he had not a knowledge of the insufficiency or defects which were the alleged cause of the injury, that he had exercised due care and diligence in the use and examination or inspection of the cars, machinery, etc., belonging to the train, while the same were in his charge and under his direction. *Id.*
10. ACTION AGAINST RAILROAD COMPANY FOR SETTING BUILDING ON FIRE BY SPARKS from a locomotive may be sustained (where direct evidence as to the cause of the fire is lacking) by proof that on other occasions engines of the company, in passing the spot, emitted sparks and coals which fell farther from the track than the building in question. Such evidence, even without connecting it with the particular engine supposed to have set the fire complained of, might suffice to cast the burden of showing that the fire was not set by the locomotives upon the company. *Sheldon v. Hudson River R. R. Co.*, 155.
11. RAILROAD COMPANY'S LIABILITY FOR INJURY TO ONE NEITHER PASSENGER NOR EMPLOYEE is governed by that pervading principle of social duty founded on the common law, that every person must so conduct his own affairs as not to injure the rights of another, expressed in the legal maxim, *Sic utere tuo ut alienum non laedas*. In such cases there is no relation arising out of any privity of contract. *Mad River etc. R. R. Co. v. Barber*, 312.
12. RAILROAD AUTHORIZED TO BE BUILT AT ONE PLACE, if built at other places, is a mere nuisance on every highway it touches in its illegal course. *Commonwealth v. Erie etc. R. R. Co.*, 471.

See COMMON CARRIERS: CONTRACTS, 8; CORPORATIONS, 4, 15; EMINENT DOMAIN.

RECEIVERS.

See PARTNERSHIP, 20.

RECORDING.

See REGISTRATION.

RECORDS.

RECORD IMPORTS ABSOLUTE VERITY in all judicial proceedings of a court of record of competent jurisdiction. *Lessee of Merritt v. Horne*, 298.

REGISTRATION.

See BONA FIDE PURCHASERS, 1-5; DEEDS, 14.

REMAINDERS.

See DEDICATION, 1.

REPLEVIN.

See SURETYSHIP.

RES ADJUDICATA.

DECISION BECOMES LAW OF CASE where the supreme court refuses to entertain an appeal from an order or judgment granting a new trial after the term at which judgment was rendered, on the ground that such order is interlocutory, and that it can be brought before the appellate court only by an appeal from the final judgment in the case, and the court cannot, upon a subsequent appeal from the final judgment, refuse to consider such order or judgment awarding the new trial. *Goss v. McClaren*, 646.

REVERSIONS.

SALE OF REVERSION BY EXPECTANT HEIR MAY BE RESCINDED FOR INADEQUACY of price, according to the established doctrine in England. *Cribbins v. Markwood*, 775.

2. RESCISSION OF SALE OF REVERSION BY ONE NOT EXPECTANT HEIR, FOR INADEQUACY of consideration, was not a settled principle of equity jurisprudence in England at the date of American independence. *Id.*
3. SALE BY ADULT OF VESTED EXPECTANT INTEREST in reversion or remainder is not against public policy in Virginia, and is binding if not procured by ill practice. *Id.*
4. INADEQUACY OF PRICE IS NOT ALONE GROUND FOR RESCINDING SALE OF REVERSION by a young man who had just attained his majority, but it may, with other circumstances, be evidence of fraud. *Id.*
5. RETENTION OF PART OF PRICE BY PURCHASER IS NO GROUND OF RESCISSION of a sale of a reversion, especially where it was withheld by consent. *Id.*

See DEDICATION, 1.

RIPARIAN RIGHTS.

See WATERCOURSES.

SALES.

1. SALE, DELIVERY, CHANGE OF POSSESSION.—A party had a quantity of hay in a barn upon a farm which he carried on by his hired man. He sold

- a quantity of it to another person, telling him he could leave it in the barn until he could haul it away. The latter, in the presence of the former, thereupon requested the hired man to take charge of the hay for him, and he said he would do so. The remaining hay in the barn belonged to the seller. *Held*, that there was not such a delivery and change of possession as the law requires to protect the property from attachment by the seller's creditors. *Sleeper v. Pollard*, 741.
2. SALE IS VITIATED BY ANY MISREPRESENTATION OR CONCEALMENT OF MATERIAL FACTS respecting the property for the purpose of deceiving, and which does deceive, the buyer. *Wintz v. Morrison*, 658.
 3. CONCEALMENT BY VENDOR OF HORSES OF FACT THAT THEY HAVE CONTAGIOUS DISEASE of a fatal character, to his knowledge, such disease not being discoverable by such an examination as a careful man would make before buying, entitles the purchaser to rescind the contract, and to recover damages for the fraud, especially where such concealment is accompanied by actual misrepresentations accounting for any suspicious appearances in the animals. *Id.*
 4. RULE OF CAVET EMPTOR DOES NOT COVER FRAUDULENT CONCEALMENT OR MISREPRESENTATION by the vendor of any material fact inducing the purchaser to buy. *Id.*
 5. INSTRUCTION AS TO MEASURE OF DAMAGES IN ACTION AGAINST VENDOR OF DISEASED HORSES FOR FRAUDULENT CONCEALMENT of the facts respecting such disease, and for the rescission of the contract on account of such fraud, to the effect that the plaintiff is entitled to the cost price of the animals that have died, with interest, and to the difference in value between those yet living which are diseased and sound animals of the same quality, with interest, and also to compensation for necessary care and attention bestowed upon the animals, is sufficiently favorable to defendant. *Id.*
 6. VENDOR OF DISEASED ANIMALS IS LIABLE FOR DAMAGES FOR COMMUNICATION OF SUCH DISEASE to other animals purchased at the same time, and also, it seems, for the communication of such disease to other animals of the purchaser, in an action by such purchaser for fraud in concealing the fact that they are so diseased. *Id.*
 7. TENDER OF RETURN OF ANIMALS TO VENDOR, IN ACTION FOR FRAUDULENT CONCEALMENT of the fact that they are diseased, is not necessary to entitle the vendee to recover his damages; nor is it necessary to entitle him to rescind the contract if the animals are entirely worthless. *Id.*
 8. VENDOR, IN SUIT BY PURCHASER TO RESCIND SALE FOR FRAUD, HAVING TRANSFERRED PURCHASER'S NOTES to third persons, so that he cannot deliver them up to be canceled, is liable for the amount in money. *Id.*
 9. IN SALE OF HORSE, IF REPRESENTATIONS AS TO HIS SOUNDNESS ARE FALSE, ARE NOT BELIEVED TO BE TRUE when made, and are made to induce a purchase, and a damage results from them, they are actionable; nor is it necessary, to constitute the fraud, that a material fact should be directly misrepresented intentionally; if a false impression is produced by words or acts in order to mislead, it is sufficient. *Howard v. Gould*, 728.
 10. DEFENDANT HAVING HORSE WHICH HAD GLANDERS, AND BEING SO INFORMED, AND PROBABLY BELIEVING SO, offering to trade him, being asked if his horse had the glanders, replying that some said he had the distemper, but that plaintiff could examine him, is liable to an action for the

false representations, as his answer amounted to an affirmation that he did not believe the horse had the glanders; and having undertaken to answer the questions put to him, he was bound to make a full disclosure. *Id.*

11. SELLER'S MERE KNOWLEDGE THAT BUYER IS PURCHASING THING WITH CRIMINAL INTENT, to put it to unlawful use, does not defeat his action for the price, on the principle of denying relief to a party *in pari delicto*. Thus one who sells stocks to a corporation, although he knows that the corporation is purchasing to sell again as a speculation, contrary to a penal provision in the charter, may nevertheless recover, on an implied *assumpsit*, the value of the stocks; otherwise when the contract provides for the illegal use of the thing sold, or when the seller does any act to promote it. *Tracy v. Talmage*, 132.
 12. BUYER MAY RECOVER FOR BREACH OF CONTRACT WITHOUT SHOWING HIS READINESS TO PAY PURCHASE MONEY, where a mutual contract had been made between buyer and seller for the sale and purchase of a horse, but before the execution of the contract the seller disposes of the horse to another party. *Harriis v. Williams*, 253.
 13. SUBSEQUENT PURCHASER OF PERSONAL CHATTEL cannot set aside prior conveyance to another's intestate on the ground of fraud. *Green v. Kornegay*, 261.
- See AGENCY, 1, 2; COMMON CARRIERS, 9, 10; DEBTOR AND CREDITOR, 2, 3.

SERVITUDES.

1. SUPERIOR OWNER MAY IMPROVE HIS LANDS BY THROWING INCREASED WATERS UPON HIS INFERIOR, through the natural and customary channels, but the principle should be prudently applied. *Kauffman v. Griesemer*, 437.
2. SUPERIOR OWNER HAS NO RIGHT TO DIG NEW CHANNELS and cause increased flow of water through them upon his inferior's land. *Id.*
3. INFERIOR OWNER IS NOT OBLIGED TO RECEIVE ON HIS LAND WATERS which nature never appointed to flow there, and may dam up a channel cut for the carrying of such waters to and upon his land. *Id.*
4. OWNER OF LAND WRONGFULLY OVERFLOWED CANNOT ERECT OBSTRUCTIONS to such overflow so as to cast it upon the land of innocent third persons. *Amick v. Tharp*, 787.
5. OWNER OF LOT UPON WHICH CITY HAS DIVERTED DRAIN, obstructing it so as to throw the water back upon a lot above him, is liable therefor, whether the act of the city was lawful or not. Nor is it material that the plaintiff was street commissioner and superintended the work at the time of the original diversion, where neither party owned his lot at that time. *Id.*

See EASEMENTS.

SHELLEY'S CASE.

1. RULE IN SHELLEY'S CASE DOES NOT APPLY WHERE ESTATES GRANTED ARE OF DIFFERENT QUALITIES, as where lands are given in special trust for the life of one person, and after his death in general trust for the heirs of the same person, the latter use being within the statute of uses, and the former not. *Stacey v. Rice*, 447.

2. UNDER RULE IN *SHELLEY'S CASE*, IF TESTATOR DEVISE TO TRUSTEE AND HIS HEIRS certain real estate for the separate use of testator's daughter, then a married woman, during her life, and after her death to her heirs in fee-simple, and the daughter afterwards become discoverd, she has an estate in fee-simple which will pass by deed to her alienes. *Id.*

SHERIFFS.

1. CONSTABLE IS BOUND TO RETURN EXECUTION AND PROCEED NO FURTHER when notified that an appeal has been entered in the cause and the execution thereby superseded. *O'Donnell v. Mullin*, 458.
2. CONSTABLE WHO PERSISTS IN SELLING PROPERTY of a defendant on an execution after notice that it has been superseded by reason of an appeal from the judgment is a trespasser as much as if he had no process in his hands. *Id.*
3. PURCHASER AT CONSTABLE'S SALE UNDER EXECUTION which has been revoked by reason of an appeal acquires no title. *Id.*
4. JUSTICE OF PEACE, AND NOT CONSTABLE, IS PROPER PARTY to determine whether appeal is regularly taken, and the constable cannot refuse to recognize it on the ground that the justice committed an error. *Id.*
5. SURETIES ON DEPUTY SHERIFF'S BOND OF INDEMNITY ARE LIABLE BY SUBROGATION TO SURETIES ON SHERIFF'S OFFICIAL BOND, when the sheriff's sureties have been compelled to pay money collected by the deputy sheriff, but not paid over to his principal. *Brinson v. Thomas*, 224.

See DEEDS, 13.

SLANDER.

DEFENDANT MAY PROVE, IN MITIGATION OF DAMAGES, IN ACTION OF SLANDER for words spoken against the chastity of the plaintiff's wife, that said wife, before her marriage with the plaintiff, had lived alone with him in the same house, where the fact of their so living was known to the defendant when he spoke the words. *Reynolds v. Tucker*, 353.

SLAVERY.

ISSUE OF FEMALE SLAVE FOLLOWS CONDITION OF MOTHER. The ownership of the mother carries with it the property in her children born during the period of such ownership, and the mother and issue are treated, in respect of the title and rights of the owner, as an aggregate property. Whatever affects the rights or remedies of the owner as respects the mother equally affects his rights and remedies in respect to her issue, while the unity of interest and possession is unsevered; and if the right of the owner is saved from the statute of limitations for a definite period as to the mother, it is saved likewise as to the issue born of her during such period. *Seay v. Bacon*, 601.

See HABEAS CORPUS, 8; HUSBAND AND WIFE, 6, 7.

SPECIFIC PERFORMANCE.

1. MUTUALITY OF REMEDY AT TIME OF ACTION brought is all that is necessary to enable a plaintiff to maintain his action on a contract. *Ives v. Hazard*, 500.

2. REMEDY BECOMES MUTUAL BY FILING BILL OF SPECIFIC PERFORMANCE of a contract for the sale of land upon a memorandum signed by the defendant alone, the bringing of the bill rendering the complainant chargeable as on a memorandum signed by him. *Id.*
3. SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LANDS SITUATED IN ANOTHER STATE will be decreed by chancery against a resident within the jurisdiction duly served. *Newton v. Bronson*, 89.
4. CODE PROVISION THAT ACTIONS CONCERNING LAND SHALL BE TRIED IN COUNTY WHERE LAND IS SITUATED does not remove jurisdiction to decree specific performance of contract for sale of lands without the state, since it does not apply to lands not situated in any county of the state. *Id.*
See SPECIFIC PERFORMANCE, 18; STATUTE OF LIMITATIONS.

STATUTES.

1. LAWS MUST BE EXECUTED ACCORDING TO SENSE AND MEANING which they import at the time of passage. *Commonwealth v. Erie etc. R. R. Co.*, 471.
2. STATUTE OF NORTH CAROLINA RELATING TO FENCES MUST BE STRICTLY CONSTRUED, such statute conferring special jurisdiction upon justice of the peace and two freeholders, who are to view the fences of any person against whom complaint is made, and in a proper case estimate damages done to the stock of the party injured; and the judgment of the justice is erroneous when he and the freeholders assess damages for which no complaint is made. *Bailey v. Bryan*, 246.

STATUTE OF FRAUDS.

1. IN PAROL SALES OF LAND, ALL EVIDENCE OF VERBAL CONTRACT WILL BE REJECTED, if being taken as true it does not make out such a case as to entitle it to stand as an exception to the statute of frauds. *Poorman v. Kilgore*, 425.
2. INSTRUMENT ITSELF NEED NOT BE SIGNED BY PARTY, TO SATISFY STATUTE OF FRAUDS, but it is sufficient if he signs some writing that refers to and accepts the instrument as his contract. *Newton v. Bronson*, 89.
3. MEMORANDUM NEED NOT SET FORTH WHOLE CONTRACT, BUT SUBSTANCE ONLY, to satisfy the statute of frauds; and where, in a contract for the sale of land, there was a stipulation that the purchaser was to pay certain annuities charged thereon, the omission of such stipulation from the memorandum signed by the vendor, where the purchaser in his bill admits it and avers his readiness to pay the annuities, is no bar to specific performance. *Ives v. Hazard*, 500.
4. MEMORANDUM OF CONTRACT FOR SALE OF LAND SIGNED BY VENDOR ALONE is sufficient, under the statute of frauds, to enable the vendee to enforce it; his own assent to the contract being provable by evidence *aliunde*. *Id.*
5. MEMORANDUM READING "I AGREE TO SELL," SIGNED BY VENDOR, describing the land, expressing the consideration and the time of payment and of giving possession, imports an agreement of sale, and not a mere offer to sell, and is sufficient as against the vendor, under the statute of frauds. *Id.*
6. MEMORANDUM NEED NOT SHOW CONSIDERATION ALREADY PAID to be good under the statute of frauds. *Id.*

7. **WRITTEN CONTRACT FOR SALE OF LANDS MADE BY UNAUTHORIZED AGENT** may be ratified by parol, as the original authority might be given by parol; and in either case the statute of frauds is satisfied. *Newton v. Bronson*, 89.
8. **WRITTEN CONTRACT FOR SALE OF LANDS MADE BY ONE TO WHOM SUCH POWER COULD NOT BE DELEGATED**, as by one assuming to act for an executor who is by the will donee of a power to sell, may be validated by ratification, but the ratification must be in writing, to satisfy the statute of frauds. *Id.*
9. **CONTRACT NOT WITHIN STATUTE OF FRAUDS.**—A contract by which one person agreed with another that if the latter would transport the former, his family, and their effects, to the state of Texas he would deed to such person one half of the land which would become his by virtue of his immigration, is valid and binding. It is neither within the statute of frauds nor against public policy. *Miller v. Roberts*, 688.

STATUTE OF LIMITATIONS.

SOME LIMITATION SHOULD BE FIXED BY LAW TO SUITS as well for specific performance as for rescission of contracts. *York v. McNutt*, 607.

See ADVERSE POSSESSION.

STREETS.

See HIGHWAYS.

SURETYSHIP.

SURETIES ON REPLEVIN BOND ARE DISCHARGED BY DISCHARGE OF ONE OF TWO DEFENDANTS by the voluntary act of the plaintiff, where the undertaking of the sureties was in the joint behalf of both defendants. *Harris v. Taylor*, 576.

SURVEYS.

See BOUNDARIES; EVIDENCE, 4, 5.

SUNDAY LAWS.

1. **PENALTIES FOR CARELESSNESS AND FOR SABBATH-BREAKING ARE TOTALLY DISTINCT**, and the laws out of which they arise are distinct in all their purposes and features. *Mchney v. Cook*, 419.
2. **LAW RELATING TO SABBATH DEFINES DUTY OF CITIZEN TO STATE**, and to the state only. One offender against law, to the injury of another, will not be allowed to set off against the plaintiff that he too is a public offender. *Id.*
3. **THAT PERSON WAS ON SUNDAY unlawfully engaged in a worldly employment** does not prevent him from recovering damages against one who obstructs a navigable stream. *Id.*

TAXATION.

1. **PERSON WHO HOLDS DEFECTIVE TITLE TO PROPERTY MAY PERFECT SAME BY PURCHASE AT TAX SALE**, if he stands in no relation of trust to, and is implicated in no fraud against, the owner. *Coze v. Gibson*, 454.
2. **SPECIAL ASSESSMENT LEVY UPON PROPERTY PARTICULARLY BENEFITED BY STREET IMPROVEMENT** is an exercise of the taxing power, and the tax levied is for the purpose of constructing a public improvement. *Hill v. Higdon*, 289.

3. **RIGHT OF TAXATION IS INSEPARABLE INCIDENT OF SOVEREIGNTY**, delegated in the general grant of legislative authority, and, the provision against poll-taxes excepted, is subject to no express limitations or restrictions, when used by the legislature as a means to accomplish a lawful purpose. *Id.*
4. **POWER TO TAX FOR LAWFUL PURPOSE NECESSARILY INCLUDES POWER** to determine the extent and upon what property the tax should be levied. *Id.*
5. **TAXATION AND ASSESSMENT ARE REGARDED AS DISTINCT MODES OF RAISING MONEY FOR DIFFERENT PURPOSES**, and founded upon different principles. Taxation is a general burden imposed for supporting the government, and the revenue raised is expended for the equal benefit of the public at large. Assessment rests upon the taxing power, but describes a distinct and well-known mode of laying a local burden upon particular property, with reference to the peculiar and special benefit derived to such property from expenditure of the money. *Id.*
6. **OHIO CONSTITUTION OF 1851, SECTION 6, ARTICLE 13, CONTEMPLATES DELEGATION OF POWER OF TAXATION**, in all its forms, to municipal corporations, with no other limitation upon this power than that it shall be so restricted by the legislature as to prevent an abuse of its exercise; but a failure to perform this duty lays no foundation for judicial correction. The principles in section 2, article 12, upon which all taxes for general revenue purposes must be levied, do not include special assessments. *Id.*

See CONSTITUTIONAL LAW, 2.

TRESPASS.

IT IS NOT TRESPASS, AND PARTY CANNOT BE INDICTED FOR REMOVING FENCE, "UNLAWFULLY AND WITHOUT LICENSE," PUT UPON HIS LAND BY ANOTHER, under a statute making it a misdemeanor "if any person shall unlawfully and willfully burn, destroy, pull down, injure, or remove any fence, wall, or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field, or pasture." *State v. Headrick*, 249.

See ANIMALS; ATTORNEY AND CLIENT, 4.

TRUSTS AND TRUSTEES.

1. **APPOINTMENT OF TRUSTEES, UNDER NEW YORK ABSENT AND ABSCONDING DEBTOR'S ACT**, is conclusive evidence that the steps leading to the appointment were regular, provided jurisdiction of the proceeding is shown. *Wood v. Chapin*, 62.
2. **PROCEEDINGS AGAINST ABSENT OR ABSCONDING DEBTOR ARE NOT VITIATED OR CONVEYANCE OF HIS PROPERTY BY TRUSTEES INVALIDATED**, by the failure of the officer before whom the proceedings were had to file his report within the statutory time, or by the failure of the trustees to record their appointment within the statutory time; for the statute is directory merely. *Id.*
3. **TRUSTEES APPOINTED UNDER NEW YORK ABSENT AND ABSCONDING DEBTOR'S ACT** take title to his property—not a mere power to convey—and their title dates from the first publication of notice. *Id.*
4. **SPECIAL TRUSTS ARE NOT WITHIN STATUTE OF USES**, and a trust to hold for the separate use of a married woman is special; if the woman becomes sole, the special trust for her separate use ceases, and the legal estate vests fully in her. *Steacy v. Rice*, 447.

5. DEVISE TO TRUSTEES FOR PARTICULAR PURPOSE vests legal estate in them as long as the execution of the trust requires it, and no longer. *Id.*
6. IT IS SUFFICIENT DELIVERY OF DEED OF TRUST IF DRAUGHTSMAN INFORMS BARGAINEE of its existence, and he consents to act as trustee under it. *Green v. Korragey*, 261.
7. DEED OF TRUST NOT INTENDED AS SECURITY FOR MONEY is not void as to creditors and purchasers if not proved and registered within six months from the time of its execution. *Id.*
8. TRUST OF LEGAL ESTATE RESULTS TO ONE WHO ADVANCES PURCHASE MONEY, whether title be taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successively. *Smith v. Strahan*, 622.
9. PURCHASE OF LAND BY PARENT IN NAME OF CHILD IS PRIMA FACIE ADVANCEMENT, so as to rebut presumption of a trust resulting for the parent. *Id.*
10. PURCHASE OF LAND BY HUSBAND IN NAME OF WIFE IS PRESUMED TO BE MADE FOR HER BENEFIT; and the presumption of a resulting trust in the one advancing the purchase money is not raised in such a case. *Id.*
11. PRESUMPTION OF RESULTING TRUST IN ONE ADVANCING PURCHASE MONEY OF LAND, when the deed is taken in the name of a stranger, may be rebutted, likewise as it is raised, by parol evidence. *Id.*
12. PRESUMPTION OF ADVANCEMENT, WHEN DEED TAKEN IN NAME OF WIFE OR CHILD, may be rebutted by evidence showing that the purchase was intended for the benefit of the husband or parent who advanced the purchase money. *Id.*
13. PRESUMPTION IN FAVOR OF ADVANCEMENT WHERE DEED IS IN WIFE'S NAME, though the purchase money is advanced by the husband, is not strengthened in Texas, as at the common law, by the rule that a wife cannot be a trustee for the husband, for this principle has little or no force in Texas. *Id.*
14. REALTY HELD IN WIFE'S NAME MAY BE SHOWN TO BE INTENDED FOR BENEFIT OF HUSBAND in a state where the fundamental principle of the marital relation is that whatever may be the unity of persons there is no unity of estates, for under such law there can be no such rule as that the wife cannot be trustee for the husband in any sense which would preclude such evidence. *Id.*
15. PRESUMPTION THAT LAND PURCHASED BY HUSBAND IN WIFE'S NAME IS INTENDED AS PROVISION FOR HER prevails in Texas, as well as elsewhere, where the rights of the wife are not so much favored. *Id.*
16. PRESUMPTION THAT LAND PURCHASED BY HUSBAND IN WIFE'S NAME IS INTENDED TO BE HERS is more easily rebutted in a state where the rights of the wife are favored than under laws which give her no interest in the community property, and a very restricted right to separate estate. *Id.*
17. INTENTION OF HUSBAND IN TAKING CONVEYANCE OF COMMUNITY PROPERTY IN NAME OF WIFE has no effect upon either his own or his wife's rights; for whether taken in his own or his wife's name, or jointly, the community character of the property is not changed. *Id.*
18. INTENTION OF PARTIES AT TIME OF EXECUTION OF DEED OF LAND IN WIFE'S NAME, where purchase money is advanced out of husband's separate property, determines whether the purchase is for the benefit of the hus-

band or wife, and this intention may be gathered from antecedent or concomitant acts and declarations of the husband. *Id.*

19. SUBSEQUENT ACTS AND DECLARATIONS OF HUSBAND ARE AS INEFFECTUAL AGAINST WIFE as they are in case of a parent against a child to rebut the presumption that a purchase of land by a husband or father in the name of a wife or child was intended for the benefit of the wife or child; but the fact of a husband or parent, even when children are minors, going immediately into possession after such purchase, and always claiming and holding such lands as his own, would, however, be some, though by no means conclusive, evidence of his original intention to make the purchase in trust for himself, and not an advancement. *Id.*
20. AT SALE BY TRUSTEE UNDER TRUST DEED, PURCHASER TAKES ONLY SUCH RIGHT AND INTEREST AS TRUSTEE HAS POWER TO CONVEY, where at the time of the sale the purchaser has notice of a deed conveying a portion of the property purchased. *Rives v. Dudley*, 231.
21. PARTY IS NOT ENTITLED TO ABATEMENT OF INTEREST ON HIS DEBT SECURED BY TRUST DEED on the ground of a prior tender, if at the time of such tender he required as a concurring stipulation an impossible condition. *Id.*
22. CREDITOR'S BILL LIES TO REACH DEBTOR'S INTEREST IN TRUST FUND after the return of an execution unsatisfied at law; but not, it seems, under the New York revised statutes, in case of a trust fund created by or proceeding from any other person than the debtor. *Per Comstock, J. Bramhall v. Ferris*, 113.

See CORPORATIONS, 11, 13, 14; EXECUTORS AND ADMINISTRATORS, 1, 2; FRAUDULENT CONVEYANCES, 3-6; SHELLEY'S CASE; USES.

UNINCORPORATED SOCIETIES.

WHERE SEVERAL PERSONS FORM ASSOCIATION TO CARRY ON MINING ADVENTURE in California, the association furnishing outfit and money for eight of its members who are to labor in the mines, and upon their return, within a certain time, to account to the association for the amount of their gains, which are to be divided among the members in a manner agreed upon, the eight members so selected to go to the mines stand in the relation of employees to the association; and if, on their arrival in California, they refuse to work together, and partition among themselves the property given to them by the association, this will not release them from their obligations to the association, nor will it work a dissolution of the association. It will release the eight members from further liability to one another; but the association may compel any one of them to account to it for his earnings while working separately, the amount found due to it to be distributed to the holders of its stock *pro rata*, but excluding from such distribution all of the eight who refuse to account to the association. *Eagle v. Bucher*, 342.

USES.

1. USE EXECUTED BY STATUTE IS LEGAL ESTATE TO ALL INTENTS AND PURPOSES, as much as if it had been given by the instrument creating the estate, without the intervention of a trustee. *Stearcy v. Rice*, 447.
2. INCORPORATION OF VOLUNTARY ASSOCIATION, AFTER DEATH OF TESTATOR, does not strengthen or impair its ability to take property given it by the will. *Owens v. Missionary Society*, 160.

3. GIFT CANNOT BE SUSTAINED AS CHARITY, unless made upon a trust (either expressed or perhaps when clearly implied from name and purposes of a charitable society to which it is made) that it shall be devoted to uses which the law recognizes as charitable. *Id.*
4. HISTORY OF LAW OF CHARITABLE USES reviewed at length; and *held*, that to warrant a court of equity in sustaining a gift as made to a charitable use, it must be made to a trustee competent to take, and for a charitable use so far defined as to be capable of being specifically executed by authority of the court. *Id.*
5. RESIDUARY LEGACY "TO THE METHODIST GENERAL AMERICAN MISSIONARY SOCIETY appointed to preach the gospel to the poor," a society not incorporated until after the testator's death, is invalid; and the next of kin are entitled to the residue as assets undisposed of. It cannot be sustained as a gift to the society for its own benefit for want of corporate power to take at the time when the gift should vest. It cannot be sustained as a gift to charitable use, because it does not name a trustee competent at the time, nor define a charitable use with sufficient distinctness to be judicially enforced. *Id.*

VENDOR AND VENDEE.

See DAMAGES, 3; FIXTURES, 3.

WARRANTY.

See AGENCY, 2.

WATERCOURSES.

1. WHAT IS REASONABLE USE OF WATER IN STREAM has been in some cases so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law. *Snow v. Parsons*, 723.
2. REASONABLENESS OF USE OF STREAM, WHEN IT IS NOT SETTLED BY CUSTOM, and is in its nature doubtful, is a question of fact to be determined by the tribunal trying the facts. *Id.*
3. RIPARIAN PROPRIETOR MUST BE ALLOWED TO USE STREAM in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below; consequently, in an action against a tanner for discharging waste bark into a stream, to plaintiff's injury, evidence which tends to show that tanneries cannot be operated to any useful purpose without thus disposing of their waste bark is admissible and very material. *Id.*
4. IN DETERMINING WHAT WOULD BE REASONABLE USE OF STREAM BY TANNER, EVIDENCE THAT IT HAD BEEN UNIVERSAL CUSTOM and practice to discharge spent bark of tanneries into streams on which they were situated, ever since the country was first settled, is admissible, and if proved would have almost the force of a law. *Id.*
5. LEGISLATIVE FRANCHISE TO BUILD BRIDGE OVER NAVIGABLE STREAM, with a proviso that it shall not impair or obstruct the navigation, if accepted by a corporation, is taken *cum oncre*, and must be enjoyed subject to the condition. *Dugan v. Bridge Co.*, 464.
6. NAVIGATION OF STREAMS IS PUBLIC INTEREST AND FAVORED RIGHT, and obstructions thereof are public nuisances. *Id.*
7. CONDITION IN CHARTER AUTHORIZING CORPORATION TO BUILD BRIDGE OVER NAVIGABLE STREAM, that it "shall not injure, stop, or interrupt the navigation," is not complied with by building the bridge in such manner as

will do as little injury as possible to the navigation as it existed when the bridge was built; and if the structure at any time during its continuance actually injures, stops, or interrupts the navigation, the company is liable to the party injured for the damages thereby sustained. *Id.*

8. CONDITION IN CHARTER TO BUILD BRIDGE, NOT TO INJURE NAVIGATION, is not limited to the kind and amount of trade on the stream at the time of the enactment, but extends to the increased business incident to the expansion of commerce and growth of the country. *Id.*
9. CORPORATION HAVING CHARTER TO BUILD BRIDGE, CONDITIONED THAT NAVIGATION SHOULD NOT BE OBSTRUCTED thereby, is not responsible for an obstruction occasioned by artificial causes created by third persons; but if occasioned by natural causes, influenced in their operation by the piers of the bridge, the corporation would be liable for the consequential damage flowing from their act, as much as if the act itself had, without an intermediate agency, occasioned the injury. *Id.*
10. WHETHER BRIDGE OVER NAVIGABLE STREAM CONSTITUTES PUBLIC NUISANCE OR NOT is a question which can only be determined by indictment at law, or a bill in equity, to be prosecuted in either case at the instance of the public authorities. *Id.*

See SUNDAY LAWS, 3.

WAYS.

1. PERPETUAL RIGHT OF WAY IS SUBJECT OF GRANT, AND NOT OF LICENSE, and can be conveyed at law only by deed or prescription. *Foster v. Brouning*, 505.
2. LICENSE PURPORTING TO GIVE PERPETUAL RIGHT OF WAY IS REVOCABLE at law, although money may have been expended upon the faith of it by the licensee in building the way; but it seems that in equity the licensee may have relief upon the grounds of estoppel and part performance of a parol contract. *Id.*

WILLS.

1. SCRIPT MAY BE PROVED AS OLOGRAPHIC WILL, though attested by subscribing witnesses. *Brown v. Beaver*, 255.
2. WILL MAY BE GOOD UNDER PENNSYLVANIA ACT of April 8, 1833, which provides that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction," where the testator has given complete directions for the drawing of such will, and it has, in accordance therewith, been put in writing in his life-time, and he is so prevented by the extremity of his last sickness from signing it himself or giving directions to another to sign it for him, if it is established in some other manner. *Showers v. Showers*, 487.
3. VIRGINIA STATUTE OF 1849 DOES NOT APPLY TO WILL PREVIOUSLY MADE, so as to determine its validity or effect, though the testator died after that statute was enacted, such wills being expressly exempted from its operation. *Ruines v. Barker*, 762.
4. ENGLISH RULE IS THAT AS TO LANDS WILL SPEAKS AT DATE, but as to personalty, at the death of the testator. *Id.*
5. TESTATOR MAY DEVISE AFTER-ACQUIRED LANDS under the Virginia statute of 1785, but not unless an intent to do so appears from the language of his will: *Allen v. Harrison*, 3 Call, 289. *Id.*

6. AFTER-ACQUIRED LANDS ARE NOT WITHIN CLAUSE "WITH EVERY ARTICLE OF PROPERTY belonging to me, excepting the wearing apparel," annexed to a direction in a will, under the Virginia statute of 1785, to sell certain specific tracts of land and shares of stock, "with all my household and kitchen furniture, all my stocks of all kinds, plantation tools and implements." *Id.*
7. AFTER-ACQUIRED LANDS DO NOT PASS BY WORDS "BALANCE OF MY ESTATE," in a will under the Virginia statute of 1785. *Id.*
8. ERASURE, BY TESTATOR, OF EXECUTOR'S NAME AFTER EXECUTION OF WILL and the insertion of another name, it not appearing when the alteration was made, is of no importance in determining when the will is to be deemed to have been made, for the purpose of ascertaining what statute governs it. *Id.*
9. DIRECTION IN WILL TO CONVERT REALTY INTO MONEY operates as an equitable conversion, and the realty is thereafter to be deemed personalty in equity. *Bramhall v. Ferris*, 113.
10. INTENTION OF TESTATOR IN MAKING BEQUEST IS TO BE ASCERTAINED, not from particular clauses of the will, but from the whole instrument; and where seemingly repugnant clauses appear, the last is to be regarded as expressing his final design on the subject. *German v. German*, 451.
11. PROVISION IN TESTATOR'S WILL, GIVING TO HIS WIDOW PRIVILEGE TO CHOOSE AND KEEP DURING HER WIDOWHOOD "all such personal property as she may think proper," and directing that "all such property as may then be left" shall be sold by his executors, entitles the widow to such property without security for such articles as may be consumed or disposed of during her life or widowhood; but under such a bequest the widow is not entitled to take money in testator's possession at his death, nor choses in action. *Id.*
12. CONDITION IN DEVISE OF LIFE INTEREST, THAT IT SHALL CEASE ON JUDGMENT AGAINST DEVISEE being recovered in a creditor's suit instituted to reach it, and that the executors shall thereafter apply the income to the support of the devisee's family, is not repugnant to the estate devised nor contrary to public policy, and is valid, and a creditor cannot reach such interest unless the income exceeds what is necessary for support. *Bramhall v. Ferris*, 113.

See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

WITNESSES.

RELEASE EXECUTED AT TRIAL OF ONE OF NECESSARY PARTIES PLAINTIFF does not make him a competent witness for his co-plaintiff. *Scott v. Brown*, 256.

WRITS.

1. RECORDARI MAY BE USED AS WRIT OF FALSE JUDGMENT. *Bailey v. Bryan*, 246.
2. WRIT DE HOMINE REPLEGIANDO WAS COMMON-LAW REMEDY for trying title to a feudal villain, and this was the writ used in this country in slave cases. *Williamson's Case*, 374.

See CONTEMPT, 1-3, 5; HABEAS CORPUS; MANDAMUS.

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